(25,510)

(25,511)

20792

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

---

## No. 680.

WESTERN UNION TELEGRAPH COMPANY AND UNITED TELEGRAM COMPANY, PLAINTIFFS IN ERROR,

*vs.*

CALVIN H. FOSTER AND FREDERICK J. MACLEOD ET AL., MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS.

---

## No. 681.

WESTERN UNION TELEGRAPH COMPANY AND UNITED TELEGRAM COMPANY, PLAINTIFFS IN ERROR,

*vs.*

FREDERICK J. MACLEOD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS.

---

**IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.**

---

**INDEX.**


| | Original. | Print |
|---|---|---|
| Judge's certificate | a | 1 |
| Writ of error (No. 24511) | 1 | 1 |
| Writ of error (No. 24561) | 2 | 2 |
| Clerk's return | 3 | 3 |
| Reservation | 5 | 4 |
| Petition | 6 | 5 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 5, 1917.

| | Original | Print |
|---|---|---|
| Exhibit 1—Report of Public Service Commission in Stock Ticker case | 9 | 7 |
| 2—Letter, Foster to Public Service Commission, March 3, 1915 | 10 | 20 |
| 3—Answer of Western Union Telegraph Co., April 15, 1915 | 11 | 21 |
| A—Agreement between Western Union Telegraph Co. and New York Stock Exchange, November 19, 1892 | 16 | 24 |
| Letter, Ely to Eckert, November 26, 1904 | 25 | 30 |
| Letter, Eckert to Ely, November 28, 1904 | 26 | 31 |
| Letter, Ely to Eckert, March 5, 1897 | 27 | 31 |
| Letter, Eckert to Ely, March 15, 1897 | 28 | 31 |
| Letter, Ely to Western Union, June 29, 1897 | 28 | 32 |
| Letter, Eckert to Ely, June 30, 1897 | 29 | 32 |
| Letter, Ely to Eckert, June 30, 1897 | 30 | 33 |
| Letter, Eckert to Ely, June 30, 1897 | 31 | 33 |
| Letter, Eckert to Ely, June 30, 1897 | 32 | 34 |
| B—Agreement between Western Union Telegraph Co. and New York Stock Exchange | 33 | 34 |
| Extracts from minutes of meeting of April 24, 1907 | 42 | 40 |
| Letter, Ely to Clowry, April 25, 1907 | 43 | 40 |
| C—Agreement between New York Stock Exchange and Western Union Telegraph Co. | 44 | 40 |
| 4—Answer of United Telegram Co. | 58 | 48 |
| Exhibit A—Agreement between United Telegram Co. and New York Stock Exchange, October 1, 1914 | 60 | 50 |
| Exhibit B—Letter, Ely to Parker, April 16, 1915 | 67 | 56 |
| Extracts from testimony of Calvin H. Foster | 68 | 57 |
| Answer of Calvin H. Foster | 69 | 57 |
| Answer of Frederick J. Macleod | 69 | 58 |
| Bill of complaint | 70 | 58 |
| Exhibit A—Order to remove discrimination | 72 | 60 |
| Answer of Western Union Telegraph Co. | 73 | 61 |
| Rescript, Foster case (No. 24511) | 77 | 63 |
| Rescript, Macleod case (No. 24561) | 78 | 63 |
| Final decree, Foster case (No. 24511) | 80 | 64 |
| Final decree, Macleod case (No. 24561) | 81 | 64 |
| Clerk's certificate | 83 | 65 |
| Opinion, Rugg, C. J. | 84 | 65 |
| Petition for writ of error (No. 24511) | 103 | 74 |
| Assignment of errors (No. 24511) | 106 | 76 |
| Petition for writ of error (No. 24561) | 109 | 77 |
| Assignment of errors (No. 24561) | 112 | 78 |
| Bonds on writs of error | 115 | 80 |
| Citations and service | 123 | 85 |
| Praecipe for record | 129 | 88 |
| Certificate of lodgment | 131 | 89 |
| Clerk's certificate | 132 | 89 |

a COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the papers hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In Testimony Whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this twenty sixth day of August, in the year one thousand nine hundred and sixteen.

[SEAL.] ARTHUR P. RUGG.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Western Union Telegraph Company and the United Telegram Company, Petitioners, and Calvin Foster and Frederick J. McLeod, Everett E. Stone, Joseph B. Eastman, and John F. Meaney, members of the Public Service Commission, Respondents, in a plea of Petition in Equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right privilege, or exemption, specially set up or claimed under such clause of the said

Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company and the said United Telegram Company, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the ninth day of August in the year of our Lord one thousand nine hundred and sixteen.

WILLIAM NELSON,
*Clerk of the District Court of the United States,*
*District of Massachusetts.*

Aug. 8, 1916.

Allowed by—
ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of*
*Massachusetts.*

2 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Frederick J. McLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, Petitioners, and The Western Union Telegraph Company and the United Telegram Company, Respondents, in a plea of Petition in Equity, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the

decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company and the said United Telegram Company, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the ninth day of August in the year of our Lord one thousand nine hundred and sixteen.

WILLIAM NELSON,
*Clerk of the District Court of the United States,*
*District of Massachusetts.*

Aug. 8, 1916.

Allowed by—

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

3 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

And now, here, the Judges of the Supreme Judicial Court, make return on these writs by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suits within mentioned, with all things concerning the same to the Supreme Judicial Court of the United States, as within commanded.

In Testimony Whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court have hereto set my hand and seal of said Court this twenty sixth day of August, A. D. 1916.

[SEAL.] JOHN F. CRONIN, *Clerk.*

4 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

To all persons to whom these presents shall come, Greeting:

Know Ye, That among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of Cases in Equity from the first day of January in the year of our Lord One thousand nine hundred and fifteen to the fourteenth day

of August, A. D. Nineteen hundred and sixteen both inclusive, it is thus contained,—the following being the entire record of the Cases:

5 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk County:*

Supreme Judicial Court.

In Equity.

No. 24511.

WESTERN UNION TELEGRAPH COMPANY et al., Petitioners,
v.
CALVIN H. FOSTER et al., Respondents.

No. 24561.

FREDERICK J. MACLEOD et al., Complainants,
v.
WESTERN UNION TELEGRAPH COMPANY et al., Respondents.

*Reservation.*

These causes were consolidated by order of this Court, and thereafter came on to be heard upon the application of the complainants in the second case for an interlocutory injunction, mandatory in form, in accordance with the prayers of their bill of complaint, and upon the question of entry of final decree in each case, upon the bills and answers therein, no issue of fact being raised by the pleadings. No evidence was offered by either party.

Now therefore, upon consideration thereof, I reserve all questions of law therein for the consideration of the Full Court, including the questions of whether the trial Court is as matter of law required to issue an interlocutory, mandatory injunction to enforce an order of the Public Service Commission pending a decision upon a petition for review of such order, upon which petition the Supreme Judicial Court has not stayed the enforcement of said order of the Public Service Commission, or whether the trial Court may in its discretion issue such an injunction.

EDWARD P. PIERCE, *J. S. J. C.*

December 1, 1915.

6

No. 24511.

WESTERN UNION TELEGRAPH COMPANY and UNITED TELEGRAM COMPANY, Petitioners,

v.

CALVIN H. FOSTER and FREDERICK J. MACLEOD, EVERETT E. STONE, Joseph B. Eastman, John F. Meaney, Members of the Public Service Commission, Respondents.

*Petition Under the Provisions of Statute* 1913, *C.* 784, *Sec.* 27.

Respectfully represent your petitioners:

1. That the petitioner the Western Union Telegraph Company is a corporation organized under the laws of the state of New York, and has a usual place of business in Boston in the commonwealth of Massachusetts. and is the lessee of the Gold & Stock Telegraph Company hereinafter referred to.

2. That the petitioner the United Telegram Company is a corporation organized under the laws of the state of New Jersey, and has a usual place of business in Boston in said commonwealth.

3. That the respondent Calvin H. Foster is a stock broker having a usual place of business in said Boston, and is the party upon whose application to said Public Service Commission the order and report of the Public Service Commission hereto annexed and marked "Exhibit 1" was made.

4. That the other respondents, namely, Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, and John F. Meaney, are members of the Public Service Commission, established by the statute of 1913, c. 784.

5. That on the 3d day of March, 1915, said Calvin H. Foster complained to the Public Service Commission, by a letter a copy of which is hereto annexed, marked "Exhibit 2," that he was unable to obtain, either from the United Telegram Company or the Gold & Stock Telegraph Company, a ticker furnishing the quotations made on the New York Stock Exchange, and making an application to said Commission to have said ticker service furnished as quickly as possible.

6. That the Western Union Telegraph Company, as lessee, filed with said Public Service Commission an answer to the complaint of Calvin H. Foster, a copy of which answer is hereto annexed marked "Exhibit 3," and the United Telegram Company filed an answer, copy of which answer is hereto annexed marked "Exhibit 4."

7 7. That the said Public Service Commission gave a hearing upon said complaint and answers, at which your petitioners, the Western Union Telegraph Company, as lessee of the Gold & Stock Telegraph Company, appeared and the United Telegram Company appeared.

8. That on the 7th day of September, 1915, said Public Service Commission, in the matter of said complaint, entered its report and

order, a certified copy of which report and order is hereto annexed marked "Exhibit 1," said order reading as follows:

*"Order."*

"It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company have without just cause denied, and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

"Ordered, That the Gold and Stock Telegraph Company, by The Western Union Telegraph Company, lessee, and The United Telegram Company shall forthwith remove said discrimination."

9. That your petitioners are interested parties in the matters hereinbefore referred to and set forth, and were so recognized by said Public Service Commission, and are affected and aggrieved by said order.

10. Said petitioners further allege that said order of said Public Service Commission was, and is, unlawful for the following reasons:

(*a*) That said Public Service Commission is without jurisdiction over the subject-matter of the complaint, and had no jurisdiction to enter the order complained of.

(*b*) That the Public Service Commission is without jurisdiction over the subject-matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress, and said Public Service Commission therefore had no jurisdiction to enter the order complained of.

(*c*) That upon the facts stated in the answer of said Western Union Telegraph Company and said United Telegram Company, and in said report of the Public Service Commission, neither said Western Union Telegraph Company nor said United Telegram Company has the legal right to render the services demanded by
8 the complainant, and now required by said order complained of, in view of their contracts with said New York Stock Exchange, set forth in their said answers.

(*d*) Because the said order is based on an erroneous ruling by said Public Service Commission that said petitioners have unlawfully and unjustly discriminated against said Calvin H. Foster, when, as matter of law, upon the facts found by said Commission in their report, said discrimination was neither unlawful nor unjust.

(*e*) That your complainants, the Western Union Telegraph Company and the United Telegram Company, would be required, in order to comply with such order, to appropriate the property of said New York Stock Exchange for the benefit of the said Foster, and thereby destroy their valuable contracts with said Exchange, contrary to the provisions of the federal Constitution, in that your petitioners would thereby be deprived of their property without due process of law.

Wherefore your petitioners pray that said ruling and order of the Commission may be reviewed, annulled, modified, or amended, as provided in said chapter 784 of the Acts of 1913, and that such further orders and decrees may be entered as to your Honors shall seem meet, and as justice may require.

WESTERN UNION TELEGRAPH COMPANY AND
UNITED TELEGRAM COMPANY,
By Their Attorney, ARTHUR LORD.

I, Arthur Lord, counsel for the petitioners, hereby certify that in my opinion there is such probable ground for the appeal hereinbefore set forth as to make it a fit subject for judicial inquiry, and that it is not intended for delay.

ARTHUR LORD.

Filed September 27, 1915.

9

EXHIBIT 1.

[Vignette.]

[P. S. C. 1084.]

THE COMMONWEALTH OF MASSACHUSETTS.

Public Service Commission.

The Stock Ticker Case.

*Petition of Calvin H. Foster Concerning Inability to Obtain "Ticker" Service from the Gold and Stock Telegraph Company and The United Telegram Company.*

Decided September 7, 1915.

P. H. Kelley and J. L. McLean for Calvin H. Foster.
Arthur Lord for The Western Union Telegraph Company, lessee of the Gold and Stock Telegraph Company.
C. F. Parker for The United Telegram Company.

*Report.*

This petition was filed on March 4, 1915. The petitioner asks the Commission to order the respondents, one or both of them, to install a "ticker" or "tickers" in his office in Boston and to furnish him with the continuous quotations of the New York Stock Exchange in the same manner and for the same price as the respondents furnish them to others. A public hearing was held on April 21, 1915. The respondents filed separate answers (The Western Union

Telegraph Company, as lessee, answering for the Gold and Stock Telegraph Company) and both ask that the petition be dismissed for the reasons,—

First, that the Commission is without jurisdiction over the subject matter of the petition, the same being within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress.

Second, that the respondents have no legal right to deliver the quotations desired to persons other than those approved by the New York Stock Exchange, as provided in the contract which each of the respondents has with said exchange.

9a In his petition Mr. Foster alleges that he has been engaged continuously in the stock brokerage business in Boston for about twenty-five years; that during all that time until the latter part of December, 1914, has had tickers furnishing him with the quotations of both the New York and the Boston Stock exchanges; that in December, 1914, the tickers furnishing the New York quotations were removed; that he has been unable since then to secure this service; that the respondents have stated that they will not furnish the service unless the application is approved by the Committee on Quotations of the New York Stock Exchange; that he has appeared before said committee in New York on two separate occasions and has given full particulars in regard to his business, answering every question asked; that, so far as he knows, said committee has not yet taken action on his applications; that he has been an approved correspondent of a member of the New York Consolidated Stock Exchange since the year 1907 and is now a member of that exchange; that, in conducting his business, he has always complied with the laws of this commonwealth; that he does not desire the quotations and service for any unlawful or improper use, but for use in his legitimate brokerage business in Boston; and that his business will suffer irreparable damage if he is unable to procure them.

These allegations were not denied by the respondents. They stated, however, that the New York Stock Exchange had notified them that the petitioner's applications had been disapproved but did not furnish the Commission with the reason or reasons for such disapproval. It appears that the petitioner's office is within the district supplied by the respondents with said quotations and service and that he is ready and willing to pay the same price that other patrons of the respondents pay and to comply with all reasonable rules and regulations applying thereto. It does not appear that the respondents, or either of them, have questioned the right of the New York Stock Exchange to disapprove the petitioner's applications without stating the reason or reasons therefor. Nor does it appear whether or not said exchange was notified by the respondents, or either of them, of this proceeding. The exchange was not represented at the hearing.

The Commission's jurisdiction over the subject matter of the petition, if any it has, is under section 2, chapter 784 of the Acts of 1913, which reads, in part, as follows:—

9b The Commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other

act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services.

* * * * * * *

The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto.

Both of the respondents are foreign corporations. The Gold and Stock Telegraph Company was organized in August, 1867, under the laws of the State of New York, for the purpose "of constructing, using, maintaining, owning and operating telegraph lines." Its business is the establishment and operation of plants, or what are generally known as "stock telegraph systems," in various communities, both within and without the state of New York, for the transmission and the selling and furnishing of stock quotations and other market news. The United Telegram Company was organized in 1890 under the laws of the State of New Jersey. The objects for which it was formed are "to receive and distribute stock market and other quotations and news reports of various kinds, and the performance of a general district messenger service, all of which is to be carried on out of this state (New Jersey)." The principal office or place of business out of New Jersey is given in the certificate of incorporation as "the City of Boston, Suffolk County, Commonwealth of Massachusetts." Both of the respondents have established "stock telegraph systems" in Boston for the transmission of, and have carried on in Boston the business of selling and furnishing, stock market and other market quotations.

Each of the respondents has a main office where there are certain electrical appliances with a keyboard attachment. These appliances are connected by a system of wires and cables, running under and across the public ways of the city, with the "ticker" instruments in the offices of the patrons. The quotations to be distributed are delivered into the main office and forthwith an employee, operating the keyboard, causes them to be written simultaneously, by means of the so-called "ticker" instruments, upon a tape of paper in the office of every patron, where they can be easily read. The quotations of the New York Stock Exchange are delivered at the main office of the United Telegram Company over a wire of the Postal Telegraph-Cable Company. They are delivered at the main office of the Gold and Stock Telegraph Company over a wire of The Western Union Telegraph Company.

On Decemebr 14, 1881, as it appears, the Gold and Stock Telegraph Company leased all of its plants, or "stock telegraph systems," both within and without this commonwealth, for the term of ninety-

nine years to The Western Union Telegraph Company, a New York corporation. Since January 1, 1882, The Western Union Telegraph Company has carried on the business in Boston formerly carried on by the Gold and Stock Telegraph Company and has carried it on in the name of the Gold and Stock Telegraph Company, as it has authority to do under said lease.

The New York Stock Exchange is a voluntary association, limited to 1,100 members, furnishing facilities to its members for the transaction of the business of buying and selling stocks and bonds. It is now the largest market for securities in this country, if not in the world, and its importance in the economic system can hardly be exaggerated. The knowledge of the prices made in transactions on the exchange has become of great commercial value in the business life of the country in general, and companies, such as the respondents, exist for the purpose of disseminating or distributing this information. These quotations when collected are property. See Stock Exchange v. Board of Trade, 127 Ill. 153; Kinsey Company v. Board of Trade, 198 U. S., 236; Hunt v. New York Cotton Exchange, 205 U. S. 322. It is, indeed, a matter of general knowledge that the transactions and prices quoted on the New York Stock Exchange evidence the market or current value of the stocks and securities listed there and that these quotations are not only a commodity in common use but are of vital importance to those engaged in the business of dealing in these stocks and securities.

The dissemination and distribution of these quotations is not a favor to the public granted by the exchange. It is, and has been from the beginning, a matter of business, a service rendered which is productive of profits. For some years the members of the exchange were apparently satisfied, as compensation for these
9d quotations, with the enhanced profits which they doubtless derived from the increased transactions in the listed securities which the wider dissemination of the quotations by the ticker companies caused; and they allowed the reporters and employees of these companies on the floor of the exchange for the purpose of collecting the quotations. This policy, however, was changed in 1892. In that year the exchange decided to collect the quotations itself and to make a charge for them. On November 19, 1892, it made its first contract with The Western Union Telegraph Company, which acted for itself and as lessee of The Gold and Stock Telegraph Company, whereby it agreed to collect and furnish the quotations to the Telegraph Company for the sum of $27,000 per annum, and further agreed that the Telegraph Company should have a monopoly of the quotations throughout the whole country except in Boston and in a prescribed area in New York city.

The contract with this exchange referred to in the answer of and relied upon by the Gold and Stock Telegraph Company, acting through its lessee, The Western Union Telegraph Company, is dated July 1, 1914, and the contract referred to in the answer of and relied upon by The United Telegram Company, is dated October 1, 1914. So far as they are material in this case, the provisions of these two contracts are very similar. In the one between the exchange

and The Western Union Telegraph Company, acting for itself and as lessee of the Gold and Stock Telegraph Company, the exchange agrees, at its own expense, to furnish to the Telegraph Company full and continuous quotations of prices made in transactions upon the exchange, for which quotations the Telegraph Company is to pay $50,000 per annum; and the Telegraph Company may retail or furnish said quotations to any person, whether a member of the exchange or not, anywhere in the United States or Canada, outside a prescribed area in New York city, provided, however, that "the Telegraph Company shall not after the first day of November, 1914, furnish quotations by ticker or otherwise, in the volume of a continuous service which is defined to be oftener than at intervals of fifteen minutes (and is herein referred to as continuous quotations) to any subscriber therefor unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company, and the subscriber shall have been approved by the Exchange."

In the contract between the exchange and The United Tele-
9e gram Company, the exchange agrees to furnish the Telegram Company the said quotations by means of a New York Quotation Company ticker installed in the office of The Postal Telegraph-Cable Company at No. 18 Broadway, New York City, for which quotations the Telegram Company is to pay the exchange $9,000 per annum. The Telegram Company is restricted to retailing or furnishing these quotations to subscribers in Boston. This contract contains a provision similar to the one quoted above in regard to the approval of subscribers by the exchange.

Both contracts contain the provision that "in case any suit or legal proceeding is brought to enjoin the Telegraph Company from refusing to furnish quotations to any person, the Telegraph Company shall at once inform the Exchange of such suit or proceeding, and shall permit the Exchange to intervene therein, or to defend the same in the name of the Telegraph Company; but in such cases, the Exchange shall indemnify the Telegraph Company against and save it harmless from any and all costs and damages awarded against it." Both contracts also contain the following interpretative provision, to wit, "It is understood and agreed that as to the right of the Exchange hereinbefore specified, to disapprove applicants for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations."

The questions involved in this case are largely questions of law. The underlying question is: Are the respondents, in supplying these quotations by means of "stock telegraph systems," engaged in furnishing or rendering a service for public use within this commonwealth?

There is no question but that the respondents are engaged in the "transmission of intelligence within the commonwealth by electricity by means of telegraph lines," to use the language of the statute. But it is clear that this business differs in kind from the usual or ordinary telegraph business, which is transmitting messages of the public for hire, and that the duty of The Western Union Telegraph

Company (lessee of the Gold and Stock Telegraph Company) to the public in its telegraph business, as the term is usually applied, is not involved in this case. This distinction between the ordinary telegraph business and the business of supplying or retailing stock and other market quotations and news by persons or companies, by means of "stock telegraph systems," has recently (1908) been noted

9f by The Western Union Telegraph Company itself in a suit in Texas against the company for damages caused by erroneous market reports. In that case The Western Union Telegraph Company set up the claim that if the plaintiff had any contract by which he was to receive market quotations the contract was with the Gold and Stock Telegraph Company; that with reference to such contract The Western Union Telegraph Company acted only as agent; and that The Western Union Telegraph Company is not engaged in the business of gathering or furnishing market reports but is confined by its charter to the transmission of telegraph messages for the public for hire. See Bradford v. Western Union Telegraph Co., 114 S. W. 683. In this case the defendant company was not successful in avoiding the payment of damages, but the claim of the defendant shows clearly the distinction between the two lines of business or services.

This distinction was also noted in a case decided in June of this year in the Supreme Court of New York for Erie county (Tucker, et al. v. The Western Union Telegraph Company and The Gold and Stock Telegraph Company). The following quotations from the opinion in this case are of interest in this connection:—

If the elements of the business were all embraced in the matters above outlined, it might be urged that the brokers were the agents of the members of the Exchange in procuring business, and through arrangements definitely made, the Exchange on behalf of the member sending to the brokers, by means of the Telegraph Company, private information to enable them to do business, the Telegraph Company would therefore be bound to deliver this information to the persons and to them only, whom the member or the Exchange should designate; the messages would be like ordinary messages, subject to secrecy. Whether they were sent in the common yellow envelope or were transmittd through the means of the ticker would make no difference.

But this is not the situation presented by this case.

If it were, the Exchange would pay the Telegraph Company for every message so sent, at rates common to all, while the fact is the Telegraph Company pays the Exchange a large sum, presumably not a gift, but a payment made for the purpose of acquiring something. If it were the business of sender and carrier, the Exchange would seek the agents, assume the work and charge for installing the tickers, while the fact is, the Telegraph Company has the responsibility of securing the patrons, installing the equipment and collecting the cost.

9g The courts of this commonwealth have not passed on the question, but it seems clear on principle that the respondents are engaged in furnishing or rendering a service for public use.

The stock and other market quotations which they sell and distribute are not only convenient and advantageous to a large section of the public but are a necessity in certain important lines of business. These quotations cannot be furnished and distributed by ticker, or "stock telegraph system," without the special privilege of using the public ways for the lines and cables essential to the service. The granting of such a special privilege, or franchise, indicates that the business carried on by the respondents was considered public in character. See Rhinehart v. Redfield, 87 N. Y. S. 789; (Affirmed 179 N. Y. 539); Pierce v. Drew, 136 Mass. 75, 77; Boston v. Richardson, 13 Allen 146, 160; New England Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397-399; State v. St. Louis, 161 Mo. 371; Emerson v. Babcock, 66 La. 257.

It was held in New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153 (on p. 163):—

Assuming these market quotations and reports are property and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph company with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them.

See also Inter-Ocean Co. v. Associated Press, 184 Ill. 450.

In the case of Smith v. The Gold & Stock Telegraph Company, 42 Hun 454, in which the principle laid down in New York and Chicago G. & S. Exchange v. Board of Trade was sustained, The Western Union Telegraph Company was made a party defendant. This was a suit in equity brought by the plaintiff to restrain the defendants from removing from his offices a stock "ticker," and from doing or failing to do any act which would in any way interfere with the receipt by the plaintiff of the quotations of the New York Stock Exchange. By one of the clauses in the contract between the plaintiff and the Gold and Stock Telegraph Company the plaintiff had agreed that the company might forthwith discontinue its service without notice, whenever, in its judgment, any breach of the conditions of the contract should have been made by him. The defendants, among other contentions, claimed that they were not chartered to carry on the business of supplying quotations. In answer to that contention the Court, by Pratt, J., said:—

* * * the charter of the corporation is not solely to be consulted in arriving at the measure of its obligations to the public.

When the charter provides that a corporation shall engage in some specified public occupation, no doubt a reference thereto will be an easy way to establish its obligations to perform such service. But we do not accede to the doctrine that, when engaged in a business concerning the performance of which its charter is silent, a corporation is freed from the obligations which ordinarily attach to a natural person engaging in such occupation.

Had defendants in the present action answered that collecting and distributing commercial intelligence being foreign to the objects for which they are incorporated, they had in consequence abandoned that branch of their business and withdrawn their "tickers" from all offices except the plaintiff's, we should not hold that they could be compelled to carry on the business for his benefit. But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations. (p. 455.)

In regard to the above-noted clause in the contract between the plaintiff and the Gold and Stock Telegraph Company, Justice Pratt said:

What regulations are reasonable may not in all cases be easy to determine. But there need be no hesitation in saying that the clause in their contract permitting them to discontinue the service when in their judgment a breach of conditions has been had, is not a reasonable regulation and affords no defence to this action. No man can be judged in his own case, and to justify defendants in refusing to perform service, there must be a reason that the Court can pronounce sufficient. (pp. 455-6.)

See also Friedman v. The Gold & Stock Tel. Co., 32 Hun. 4 (1884) and Shepard v. Same, 38 Hun 338 (1885).

It is to be noted that these cases against the Gold and Stock Telegraph Company arose after its plants, or "stock telegraph systems", had been leased to The Western Union Telegraph Company, to wit, after January 1, 1882; and also that they arose before the Exchange inaugurated the policy of collecting the quotations itself and charging respondents for them, to wit, before November 19, 1892.

It is too well established to require further citation of authorities that one engaged in furnishing or rendering a service for public use cannot, without legal reasons therefor, refuse to furnish such service to a particular customer if the service demanded be of a character which it holds itself out as prepared to furnish to the public of the class to which the applicant belongs. The respondents contend that the contracts between them and the New York Stock Exchange, providing for the right of approval by the exchange of the patrons for these quotations and service, furnish legal grounds for their discrimination against the complainant. This contention we must hold to be unsound.

The provision in the contract which reads, "It is understood and agreed that as to the right of the Exchange hereinbefore specified to disapprove applicants for quotations and to require the discontinu-

ance of the furnishing of such quotations on notice given by it—it is the intent only to prevent the unlawful or improper use of such quotations", is most significant. It is a well-known principle of law that those engaged in the business of furnishnig or rendering a service for public use may properly refuse to furnish or render such service in furtherance of a purpose or business which is illegal or improper from the viewpoint of the public. See Bryant v. Western Union Tel. Co., 17 Fed. 825; Metropolitan G. & S. Exch. v. Board of Trade, 15 Fed. 847; Goodwin v. Telegraph Co., 136 N. C. 258. Thus, notwithstanding the respondents are held to be engaged in furnishing or rendering a service for public use, the provisions in the contracts between them and the exchange providing for the approval by the exchange of the patrons for the quotations, read in the light of the above-quoted interpretative provision, are not only legal to the extent of retaining in the exchange sufficient interest and control over these quotations to enable it to appeal to the courts for aid in keeping them from the hands of those who would procure them wrongfully or who desire them for illegal and improper use (see Kinsey v. Board of Trade, 198 U. S. 236; Hunt v. New York Cotton Exchange, 205 U. S. 322), but they are laudable and wholesome, tending as they do to check unlawful and improper conduct.

And these provisions for approval by the exchange must be construed in the light of the above-quoted interpretative provision. This confines to a very narrow area the grounds upon which the exchange can exercise its right to disapprove applications. There is no room here for caprice, prejudice or malice; nor any room for a mere suspicion that the applicant desires the quotations for an unlawful and improper use; nor any room for any reason whatever other than the fact that the quotations are desired by the applicant for an unlawful and improper use. Unless these provisions are so construed they must be held to be invalid as hampering and restricting those engaged in furnishing or rendering a service for public use in their duty to the public. Assuming that the quotations of the New York Stock Exchange are not affected with a public use or public interest, and that the exchange may withhold them entirely from the public, yet when it sells its quotations to the respondents with a view to their dissemination and distribution it is not making contracts for the sending of ordinary telegraph messages but is making contracts with parties engaged in the business of furnishing and rendering a service for public use, and whose duty to the public is the supplying and furnishing of market quotations. See Smith v. The Gold & Stock Tel. Co. et al., 42 Hun 454; New York & Chicago Gold & Stock Exchange v. Board of Trade, 127 Ill. 153. And this duty cannot be hampered or restricted by any arrangement or contract between the parties. When property is sold or leased to those furnishing or rendering a service for public use it becomes affected with a public interest and there can be no restrictive covenants. See Delaware & A. Tel. & Tel. Co. v. Delaware, 50 Fed. 677; Commercial Union Tel. Co. v. New England Tel. & Tel. Co., 61 Vt. 241; Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399; The Buffalo East Side

R. R. Co. v. The Buffalo St. Railroad Co., 111 N. Y. 132, 140; Union T. & S. Bank v. Telephone Co., 258 Ill. 202, 208. To hold otherwise would be to permit those engaged in furnishing or rendering a service for public use to commit to other individuals, corporations and associations, the right to determine their public duties in respect to furnishing service.

The respondents in support of their contention that their contracts with the exchange furnish a valid reason or excuse for refusing to supply the complainant with the quotations and
91 service he desires, strongly rely upon the case In re Renville et al., 61 N. Y. S. 549 (1899). In this case the petitioner sought to compel the Gold and Stock Telegraph Company to place a ticker in his office and to furnish him with quotations from the New York Stock Exchange. The court denied his application. That the decision in that case turned upon a different state of facts and is not to be taken, even by the courts of New York, as governing the present relations of these companies to each other and to the public is made clear by the language of the court in Tucker et al. v. The Western Union Telegraph Company and the Gold & Stock Telegraph Company, supra. Denying the application of the defendants to vacate a temporary injunction restraining them from discontinuing ticker service the court in distinguishing the Renville case said:

In that case the Court refused a mandamus to compel the Telegraph Company to furnish petitioner with quotations of the Exchange in the same manner as furnished to others. This decision was made in 1899, before Telegraph Companies were brought within the Public Service Commissions Law. It does not appear that the applicant in that case conformed to the reasonable rules and regulations, nor that the respondents were not acting within their rights in refusing the service.

The conclusion reached here does not conflict with the law of the Renville case applied under then existing conditions. It appears in that case (p. 43) that 'this private voluntary association (The Exchange) being thus in control of its own property, and having the absolute right to give information as to the dealings of its members with each other to whom it pleases, and upon such conditions as it pleases to impose, gives certain information to the defendants to be delivered to certain specified persons, and upon condition that the defendants give such information to such specified individuals and none other."

It appears that by the agreement between the Exchange and the Telegraph Company then in force, the Telegraph Company had the right (p. 41) "to serve said reports to * * * all persons, firms, corporations and organizations in New York City and elsewhere * * * except to persons who may be directly or indirectly engaged in the promotion or maintenance of 'bucket shops.'"

It thus appears that the purpose of the restrictions was to prevent the furnishing of quotations to bucket shops; that the Exchange retained control of its own property, and specified the person, to whom it should be delivered. It would seem that it would be nearer correct if it stated the persons to whom it should not be delivered.

In the present case the Exchange does not specify any persons whatever. It delivers the property for value to the Telegraph Company with the only legal restriction that the telegraph company shall not specify any persons engaged in promoting
9j bucket shops. The Telegraph Company has specified these plaintiffs, who are entitled to the presumption that they are not in the prohibited class, and moreover it is alleged and not controverted, that they are not in the business of promoting bucket shops.

See also Heim v. N. Y. Stock Exchange, 118 N. Y. S. 591 (1910) and N. Y. Laws, 1913, Chap. 477.

The respondents also strongly rely upon Kinsey v. Board of Trade, 198 U. S. 236, and Hunt v. New York Cotton Exchange, 205 U. S. 322. Neither of these cases tends to establish the contention of the respondents. Both recognize the right, which is not controverted here, of the exchanges or markets to protect their quotations against pilferers, or those who would secure them wrongfully, and against their illegal and improper use. But in neither case was it decided, nor was it necessary to a decision, that exchanges or markets in furnishing or distributing their quotations through the agency of companies engaged in the business of furnishing and rendering a service for public use, could make unjust and unreasonable discrimination as to persons. In Kinsey v. Board of Trade, 198 U. S. 236, Justice Holmes, on page 251, referring to the case of New York & Chicago G. & S. Exchange v. Board of Trade, supra, which held that market quotations when furnished for distribution become affected with a public interest, says: "But it is not necessary to consider whether we are bound by that decision or, if not, should follow it, since in these cases the claim is not qualified by submission to reasonable rules or an offer of payment. It is a claim of independent rights and a denial that the plaintiff has any right at all. The Supreme Court of Illinois gave no sanction to such a claim as that."

The same year, 1905, that the case of Kinsey v. Board of Trade was decided, the Supreme Court of Indiana in Western Union Tel. Co. v. State, 165 Ind. 492, held that where a telegraph company in connection with other business buys continuous market quotations and sells the same to others, for such time as to make quotations necessary to business, it must supply them to all on equal terms.

The respondents contend that the Commission should assume that the exchange acted in good faith and disapproved the petitioner's application on the grounds specified in the contracts, to wit, that the petitioner desired these quotations for an "unlawful and improper use." It is not, however, for the Commission to make any such assumption. It is the duty of the courts or of any regulating and supervising body established by the legis-
9k lature, such as the Commission is, to determine on the evidence before it whether or not unjust and unreasonable discrimination is made by persons, natural or artificial, engaged in furnishing or rendering any service for public use. It was open for the exchange to appear at the hearing and sub-

mit any evidence it might have, if any, of the unlawful and improper use for which the petitioner desires these quotations, and we take it that the respondents promptly notified the exchange of this proceeding, as it comes plainly within the spirit if not within the strict letter of the provisions in the contracts making it the duty of the respondents to notify the exchange at once of any suit or legal proceeding brought to enjoin the respondents from refusing these quotations to any person. But whether or not the exchange was notified of this proceeding, the Commission must decide the case on the evidence before it. There was no evidence whatever that the petitioner desired these quotations for unlawful and improper use. If the exchange can, by disapproving the petitioner's application and without submitting, when its decision is called in question before the proper authorities, evidence to prove that he desires the quotations for unlawful and improper use, keep the respondents from furnishing him with these quotations and ticker service, it may thus without producing any evidence cut off from receiving them any banker, broker or other person for any reason or, indeed, without reason. Such a power in this country is unthinkable. Where a public service or public use is involved there can be lodged nowhere powers of unjust and unreasonable discrimination.

The respondents further contend that the Commission is without jurisdiction; that the matter in controversy is "within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress."

The telegraph is an instrument of commerce and as such, for some purposes, comes within the interstate commerce clause and postal clauses of the Federal Constitution; and the provisions of section 3 of the Acts of Congress to regulate interstate commerce were, by amendment of June 18, 1910, extended to "telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory or district of the United States to any other state, territory, or district of the United States, or to any foreign country." And this amendment also provides that its provisions shall not apply "to the transmission of messages by telephone, telegraph, or cable wholly within one
91 state and not transmitted to or from a foreign country or from or to any state or territory as aforesaid."

It seems clear that this amendment was intended to apply to telephone and telegraph companies in their business of serving the general public as common carriers of messages. There is involved in this case, as we view it, no question concerning the duty to the public of a telegraph company in its ordinary telegraph business of carrying or transmitting messages to the public for hire. The business of the respondents which we are dealing with is, as we have before noted, a public business of a very different character. There are no messages, in the ordinary sense of the word (the sense in which we conceive it to be used in the amendment referred to above) sent from anywhere. The respondents purchase in New York city a certain commodity or property, to wit, quotations of the New York Stock Exchange. They are no under no obligations to the exchange to send this property or commodity anywhere. In

order to resell or to retail it in Boston the respondents have it conveyed or shipped to Boston by the only means by which it can effectively be conveyed, over fast wire telegraph lines,—in the case of the Gold and Stock Telegraph Company over the wires of The Western Union Telegraph Company, and in the case of The United Telegram Company over the wires of The Postal Telegraph-Cable Company. It is delivered in Morse code at the main offices of the respondents in Boston and at these offices is translated into words and numerals in the ordinary alphabet and sent out over their respective "stock telegraph systems" to their various patrons.

There is no doubt, of course, that while it is being conveyed over the wires from New York to the main offices of the respondents in Boston it is a commodity or property moving in interstate commerce over which Congress has jurisdiction. But in our opinion the jurisdiction of Congress ceases when the property is delivered at the main offices in Boston. After it is delivered there the respondents are under no duty or obligation to the exchange to resell or distribute it. Mr. Justice McKenna said, of moving picture films shipped into the State of Ohio, speaking for the court in Mutual Film Corporation v. Industrial Com., 35 Sup. Ct. Rep. 390 (1915), "There must be some time when the films are subject to the laws of the State, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors." There must, likewise, be some time when the commodity or property in question
9m in this case becomes subject to the laws of Massachusetts. In our view, it is when the quotations are delivered at the respective main offices of the respondents in Boston.

If, however, we are in error in this view, as there has been no specific action by the Interstate Commerce Commission dealing with the subject-matter in controversy in this case, and as it is not clear that this matter is within the above-mentioned amendment of June 18, 1910, we hold that until Congress or the Interstate Commerce Commission takes some specific action this Commission has jurisdiction. Indeed the duty of the companies to give service with substantial impartiality and without invidious discrimination is a common-law duty not dependent upon legislative enactment or administrative order. It would seem beyond question that in the absence of any specific action by Congress or the Interstate Commerce Commission there resides in the State courts and commissions at least concurrent power of remedial action. The order for the removal of the discrimination complained of in this case is an enforcement of the common-law duty of the companies and cannot be said to impose any tax or burden upon the interstate transmission of the quotations nor to embarrass obstruct or impede the full and fair performance of service to any persons or corporations not within the jurisdiction of this commission. See Missouri Pac. Rwy. Co. v. Larrabee Flour Mills Co. 211 U. S. 612, 623. See also Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940, where it was held that a state commission may regulate the price to be charged by gas companies furnishing natural gas to consumers within the state although some of the gas supplied is piped from other states. See also Western Union Telegraph Co. v. James, 162 U.S.

650, 660-1; Vermilye v. Western Union Tel. Co., 207 Mass. 401, and cases cited. The respondents, if they furnish or supply to any customer in Boston the quotations of the New York Stock Exchange by means of ticker or "stock telegraph system," must furnish or supply them without unjust and unreasonable discrimination to all customers within the district or districts supplied by their respective services who will comply with all lawful regulations connected with said service, and who desire said quotations for lawful and proper use.

9n *Order.*

It appearing that the Gold and Stock Telegraph Company, by The Western Union Telegraph Company, lessee, and The United Telegram Company have without just cause denied, and refused to supply to, Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

Ordered, That the Gold and Stock Telegraph Company, by The Western Union Telegraph Company, lessee, and The United Telegram Company shall forthwith remove said discrimination.

By the Commission.

ALLAN BROOKS,
*Assistant Secretary.*

Approved by the State Board of Publication.

10 EXHIBIT 2.

C. H. Foster. Member of Consolidated Stock Exchange of N. Y. Stock Broker. 246 Washington Street, 60 Devonshire Street.

BOSTON, MASS., March 3, 1915.

Public Service Commission, 1 Beacon Street, Boston, Mass.:

DEAR SIRS: I desire to notify you that I have been unable to obtain from either the United Telegram Company or the Gold and Stock Telegraph Company a ticker furnishing the quotations made on the New York Stock Exchange. Both of these companies are organized under the Laws of Massachusetts, and are doing business in this State.

I have been engaged continuously in the stock brokerage business in the City of Boston for something like 25 years. During all that period until the latter part of December, 1914, I have had tickers giving quotations on both the New York Stock Exchange and the Boston Stock Exchange. In December, 1914, the tickers which furnish the New York quotations which I have had in my office, 246 Washington street, Boston, were removed and I have been unable to secure them since that time. I have made proper application to both companies and offered to pay the charge for the service.

It seems that since December these ticker companies will not furnish the tickers without the applications are approved by the Committee on Quotations of the New York Stock Exchange. I have appeared before that committee in New York two seperate times, and have given them a full statement of my business, and answered every question which they cared to ask. So far as I know they have not yet taken any action on my application. I understand that your commission have control of this service, and I wish to make an application to this commission to have this service furnished as quickly as possible. I understand everybody wishing a ticker in the City of Boston has had their application granted excepting my application.

I have been an approved correspondent of a member of the New York Consolidated Stock Exchange since the year 1907, and within the past few months have become a member of that Exchange. Since 1907 I have done my business through a member of that Exchange who has been in good standing there. In conducting my business I have always complied with the Laws of
11 Massachusetts in every way. I will be glad to give your commission any further information on this subject that is desired.

Yours very truly,

CALVIN H. FOSTER.

EXHIBIT 3.

Public Service Commission of Massachusetts.

In the Matter of the Complaint of CALVIN H. FOSTER against The United Telegram Company and the Gold & Stock Telegraph Company.

To the Honorable Members of the Public Service Commission of the State of Massachusetts:

The Western Union Telegraph Company has received a copy of the complaint of Mr. Calvin H. Foster, embodied in his letter to your Honorable Commission, dated March 3, 1915, making certain statements concerning the United Telegram Company and the Gold & Stock Telegraph Company, alleged to be companies engaged in furnishing quotations of the New York Stock Exchange for distribution in the city of Boston.

The Western Union Telegraph Company, as lessee of the Gold & Stock Telegraph Company, desires to communicate to your Commission the facts respecting the matter so far as concerns the Gold & Stock Telegraph Company, and states that it has no connection whatever with the United Telegram Company.

The Western Union Telegraph Company, in answer to said complaint, begs to state that it is advised that the whole matter is within the sole jurisdiction of the Interstate Commerce Commission, and

therefore not a subject matter of which your Honorable Commission can take cognizance.

It further states that said Gold & Stock Telegraph Company referred to in said complaint is not a corporation of the State of Massachusetts, but is a corporation of the State of New York, organized in the year 1867 under the laws of New York.

In order that the matter may be presented in all its aspects, however, and in order that your Honorable Commission may be fully advised of all the facts which may arise in connection with said complaint, said Western Union Telegraph Company begs to state that said Gold & Stock Telegraph Company was organized as aforesaid under the telegraph laws of the State of New York for the purpose of transmitting to subscribers within the State of New York and elsewhere, quotations of dealings upon the New York
12 Stock Exchange and other Exchanges then existing in the City of New York for the sale of produce, cotton and other commodities.

These Exchanges then were, and some continue to be, unincorporated associations of individuals. The New York Stock Exchange has continued to be an unincorporated voluntary association having control of the building in which it is located and upon the floor of which, under the rules established by it the eleven hundred members deal with each other in selling and buying securities, either on behalf of the members or on behalf of individuals employing them to act as brokers in buying and selling stocks and bonds dealt in upon said Exchange.

At the time of the organization of said Gold & Stock Telegraph Company for the transmission and delivery of quotations, its employees went upon the floor of said New York Stock Exchange and collected and collated the quotations of sales there made, and these quotations were transmitted by wire to subscribers. Ticker instruments were early used as an instrumentality for the delivery of such quotations, being located in the offices of subscribers for that purpose.

On or about the 1st day of January, 1882, all the property and business of said Gold & Stock Telegraph Company was leased to said Western Union Telegraph Company, for a period of ninety-nine (99) years, and that since that time employees of the Western Union Telegraph Company have been engaged in performing the service theretofore rendered by employees of the Gold & Stock Telegraph Company, and continued to do so until on or about the 19th day of November, 1892, when said New York Stock Exchange, availing itself of a right belonging to it, excluded said Western Union Telegraph Company and its employees from the floor of said Exchange, and itself, through its own employees, insisted upon the right of collecting and collating the quotations of securities dealt in upon the floor of said Exchange, and transferred to said Western Union Telegraph Company the quotations so collected and collated, which thereupon were transmitted by said Western Union Telegraph Company to persons employing it to furnish them with said quotations of stocks and bonds dealt in upon said New York Stock Exchange.

That on said 19th day of November, 1892, said New York Stock Exchange, acting through its duly appointed officers with the duly appointed officers of said Western Union Telegraph Company, entered into a contract for the purpose of carrying out the above mentioned policy of said Exchange, a copy of which contract is attached hereto and made a part of this answer, marked Exhibit A,
13 which contract controlled the action of the parties thereto up to and including June 30, 1897, when said contract expired, due notice of its termination having been given by said New York Stock Exchange, as shown by the correspondence between the officers of the parties thereto, a copy of which correspondence is printed as a part of and included within said Exhibit A.

That during the operation of said contract said New York Stock Exchange insisted upon (and the same was acceded to it by said Western Union Telegraph Company) its right to determine in each instance, the person who should be entitled to receive the quotations of stocks, bonds and other securities dealt in upon said Exchange, through and by means of ticker instruments, to be furnished by respondent, the Western Union Telegraph Company.

That from the 30th day of June, 1897, the date of the termination of said contract, a provisional arrangement existed for the continuation of the services under that form of contract, from day to day, until on or about the 1st day of August, 1900, when a new contract was entered into, a copy of which is hereto attached and made a part of this answer, marked Exhibit B, under which said Western Union Telegraph Company transmitted said quotations to such persons as were approved by the officials of said Exchange in accordance with the provisions of said contract, and not otherwise.

That at the time of the closing of the Stock Exchange the officers of said Exchange and of the Western Union Telegraph Company were engaged in the consideration of the terms of a new contract, which new contract was executed on or about the 9th day of September, 1914, and dated from the 1st day of July, 1914. A copy of this contract is attached hereto and made a part of this answer, marked Exhibit C.

That heretofore, on the 22d day of October 1914, in accordance with the terms of said contract of July 1st, 1914, between said Exchange and respondent, the Western Union Telegraph Company, it transmitted to the officers of said Exchange the application of complainant herein for said continuous quotations, for approval by said Exchange, without which, under the terms of said contract of July 1st, 1914, it is not at liberty to furnish said quotations to complainant.

That said New York Stock Exchange has not approved the application of complainant so submitted to it, and has advised this respondent that it has declined to approve the application of said complainant.

That respondent, the Western Union Telegraph Company, by reason of the fact that it has not such control over said quotations as to enable it to transmit the same to complainant with-
14 & 15 out the approval of said Exchange, and in obedience to the dictates of good faith in performing the obligations of said

contract, and for no other reason whatsoever, determined not to continue said ticker service to complainant herein.

And respondent says that should your Honorable Commission make an order requiring it to furnish said quotation service to complainant under the circumstances and conditions above set forth, the respondent, the Western Union Telegraph Company, would be required, in order to comply with such an order, to appropriate the property of said New York Stock Exchange for the benefit of complainant, and would result in the destruction of its contract with said New York Stock Exchange, contrary to the provisions of the Federal Constitution in that respondent would thereby be deprived of its property without due process of law.

The Western Union Telegraph Company has no information as to the statements contained in complainant's letter of March 3d, 1915, as to his business relations in Boston, and must therefore leave complainant to such proof thereof as the Commission may require.

Wherefore, said complaint should be dismissed,

First. For the reason that your Honorable Commission is without jurisdiction over the matters stated in said complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress of the United States.

Second. For the reason that upon the facts above stated said Western Union Telegraph Company has no legal right to render the service demanded by complainant in view of its contract with said New York Stock Exchange hereinbefore set forth.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY,
By RUSH TAGGART,
*General Counsel.*

New York, April 15th, 1915.

16 EXHIBIT A.

This Agreement made and entered into this 19th day of November, 1892, by and between the Western Union Telegraph Company, acting for itself and as Lessee of the Gold and Stock Telegraph Company, hereinafter designated as the "Telegraph Company," party of the first part, and the New York Stock Exchange, hereinafter designated as the "Stock Exchange," party of the second part:

Whereas the Telegraph Company has made application to the Stock Exchange for the privilege of receiving, for distribution to its customers, the quotations of prices and reports of transactions occurring upon the New York Stock Exchange, and said Stock Exchange is willing to grant said privilege to said Telegraph Company upon the terms hereinafter set forth:

Now therefore, this Agreement Witnesseth:

That in consideration of the premises and of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

First. The Stock Exchange agrees at its own cost and expense, to collect, furnish and transmit to the Telegraph Company in the manner hereinafter provided, for distribution by the Telegraph Company, as hereinafter provided, full and continuous reports of the current transactions, news, quotations and statistics made or originating in the Stock Exchange of such things as are, or may be dealt in by the members thereof during the hours for trading prescribed by its rules, and also the changes which may occur in the same from time to time. Said reports shall embrace such quotations and other information as have heretofore been usually supplied by said
17 Exchanges to the Gold and Stock Telegraph Company and while the said Stock Exchange does not guarantee that the same shall be absolutely accurate or shall embrace all the transactions occurring or originating in said Exchange, it will nevertheless use reasonable diligence to make the same as full, complete and accurate as may be practicable.

The Stock Exchange shall furnish booths and instruments on the floor of its Exchange and wires connecting said instruments with the Telegraph Company's wires in the basement of the Exchange, or at such other point in said building as may be determined by the Committee of Arrangements of said Exchange; and the Telegraph Company shall be permitted to connect its wires from said building to its Commercial News Department and its main office; and the Stock Exchange shall by its own operators transmit said repoots hereinbefore provided for from said booths on the floor of its Exchange, directly and promptly over its wires, and the Telegraph Company shall receive the same over its said wires by its own operators. The wires of the Telegraph Company connecting with those of the Stock Exchange shall not be connected with any other wires, by repeater or other device, but the reports shall be taken from them by operators of the Telegraph Company at its said main office and Commercial News Department, and shall be thence retransmitted by the Telegraph Company's operators over independent wires to its customers.

The Telegraph Company further agrees that the wires over which said reports are transmitted to its said main office and Commercial News Department, shall be so arranged and protected as to render the same, as far as possible, incapable of being tapped, and that the Telegraph Company shall use its utmost endeavors to prevent the said reports or any part thereof, being taken off said wires, or in any way diverted or distributed, prior to their being taken off at said main office and Commercial News Department, as here-
18 inbefore provided. The transmission of such reports to the Telegraph Company shall be simultaneous with, and shall be performed in like and equal manner and time with their transmission to the New York Quotation Company, and no preference shall be given either company in such service.

Second. The Telegraph Company shall have the right to serve

said reports to members of the New York Stock Exchange at their offices north of Chambers Street in New York City, and shall also have the right to serve said reports to each Director of the Telegraph Company who is a member of the Stock Exchange on one ticker in the office of any such Director, located south of Chamber- Street; but said Telegraph Company shall not serve said reports to any members of the Stock Exchange except as herein provided.

The Telegraph Company shall charge members of the Stock Exchange for the use of tickers delivering such reports in their offices, north of Chambers Street and south of Sixtieth Street in New York City, not exceeding Twenty-five dollars ($25.00) per month for each ticker.

The Telegraph Company shall also have the right to serve said reports to all persons, firms, corporations and organizations in New York City and elsewhere, wherever the Telegraph Company may desire to serve them, except to organizations or Exchanges in the City of New York competing with the New York Stock Exchange, and except to members of the Stock Exchange south of Chambers Street, New York City, and except to persons who may be, directly or indirectly, engaged in the promotion or maintenance of "bucket" shops; and the Telegraph Company will not contract to furnish tickers, and will not furnish tickers, to any person, firm, corporation or organization in New York City not already having its instruments, until the application of such person, firm corporation
19 or organization shall have been submitted to, and approved by at least three members of the Committee of Arrangements of the Stock Exchange; and as its existing contracts expire from time to time, it will not make renewals thereof, or continue to furnish service to such parties in New York City until their respective applications for such renewals have been in like manner submitted and approved. But these provisions shall be construed liberally to the Telegraph Company to the end that its service of, and revenue from, such reports shall not be unreasonably restricted, and that its patrons shall not be embarrassed. Such applications shall be acted upon promptly by said Committee of Arrangements.

The Telegraph Company shall not be required to remove any of its tickers which are under restraint by injunction of the Courts during the pendency of such injunction, but diligent efforts shall be made by the Telegraph Company to secure the removal of such injunctions, at its own cost and expense in cases in which the Stock Exchange may so desire or request. In the event that the Stock Exchange shall be dissatisfied with the conduct of the defense by the Telegraph Company in any such suit or action, the Stock Exchange shall, upon demand, have the right to conduct such defense by counsel of its own selection, in the name and at the expense of the Telegraph Company.

Third. Except for the purpose of distribution to members of the Stock Exchange south of Chambers Street in New York City by the New York Quotation Company, or by such other instrumentality as the Stock Exchange shall from time to time select, and for distribution in the City of Boston by the United Telegram Company, the

Stock Exchange agrees that it will not grant the privilege of receiving and transmitting or using, nor will it furnish to any person, party, firm or corporation other than the Telegraph Company, any quotations, reports, news or statistics of transactions, trades
20 or dealings on said Exchange nor will the Stock Exchange (so far as it can lawfully prevent the same) permit, suffer or allow any of its members to receive, use, transmit, distribute or deliver, for sale or distribution, any of the said quotations, reports, news or statistics of transactions, trades or dealings on said Stock Exchange, nor will said Stock Exchange do any act whereby any other person, firm or corporation than the Telegraph Company party hereto (except as above mentioned) shall acquire any right to receive, use, transmit, distribute or deliver, for sale or distribution, any of the said quotations, reports, news or statistics of transactions, trades or dealings on said Stock Exchange; but nothing herein contained shall be construed to apply to the publication and distribution by other than electrical devices, of quotation sheets and price lists of transactions on said Exchange.

For the purpose of protecting the Telegraph Company against the use of any quotations, reports, news or statistics of the Stock Exchange by parties not entitled to them, the Telegraph Company may prosecute by suit, injunction or other legal remedies proper and suitable for the prevention or stoppage of such competitive use either in its own name or in the name of the Stock Exchange or its proper officers, any party or parties obtaining or using said quotations, reports, news or statistics not entitled to them, whether obtained from the Stock Exchange or its members or employees, or otherwise; and in case the Telegraph Company shall sue and proceed in the name of the Stock Exchange, the Stock Exchange shall, by its proper officers, do all such proper acts and things, and sign all such proper and necessary papers, in order to enable the Telegraph Company to conduct proceedings with due diligence and effect. All such suits and other legal proceedings, whether carried on by the Telegraph Company in its own name or in the name of the Stock Exchange, shall be at the sole cost and expense of the Telegraph Company; and the Telegraph Company agrees to indemnify and
21 save harmless the Stock Exchange of and from all damages, expenses, costs, charges and fees incurred in or arising out of any such suit or proceeding.

Fourth. As compensation for the privilege of receiving said quotations and reports, hereby granted by the Stock Exchange to the Telegraph Company, the Telegraph Company agrees to pay to the Stock Exchange the sum of Twenty-seven thousand dollars ($27,000.00) per annum, in equal installments of Two thousand two hundred and fifty dollars ($2,250.00) at the close of each month during the continuance of this agreement, and in case the Telegraph Company shall make default in the payment of any such instalment for the period of five days after the same becomes due, the Stock Exchange may forthwith terminate such privilege without notice.

In case the Stock Exchange shall at any time during the continuance of this agreement refuse to all other parties the right to

receive, use, transmit and deliver its quotations, news and statistics in the City of Boston, and shall grant such privilege in Boston exclusively to the Telegraph Company party hereto, then and from henceforth for so long during the continuance of this agreement as said exclusive privilege for the said City of Boston is continued by said Stock Exchange to the Telegraph Company party hereto, the monthly payment herein provided to be made by the Telegraph Company to the Stock Exchange shall be increased to the sum of Two thousand five hundred dollars ($2,500.00) per month.

Fifth. For the purposes of this agreement, the term, "member of the Stock Exchange" shall be construed to include any firm one or more of whose partners are members of the Stock Exchange.

Sixth. The Telegraph Company party hereto, agrees for itself and the Gold and Stock Telegraph Company on the one side, and the Stock Exchange agrees for the New York Quotation Com-
22 pany on the other, that any improvements upon the instruments now in use by either of the said Companies which may be owned and introduced in the ticker service in New York City during the continuance of this contract by either of the said companies, may be used by the other of said companies in New York City during the continuance of this agreement free of charge, and in case any such improvement shall be introduced by either company under a license or other arrangement short of ownership of the patent covering the same, the company availing itself of such license or other arrangement shall procure a similar license or other arrangement for the other company, to continue during the existence of this contract, in which case each company shall pay royalty under such license in the proportion that the number of its instruments using such improvements bears to the whole number or instruments of both parties on which such improvement is used, and in default thereof shall not be at liberty to use such improvement in its own service.

In case additional corporate action shall be required by any of the parties, such further action shall be obtained and such further agreements shall be executed as may be necessary for the carrying out of this provision according to its true intent, so that the actual expense and royalty under the license or other arrangement incurred by the company introducing the improvement shall be the measure of compensation to be paid by the other.

Seventh. The provisions of this agreement applicable to the New York Quotation Company shall apply from time to time to such other company, if any, as shall be substituted by the Stock Exchange for the said Quotation Company for serving its quotations, news and statistics to the members of said Stock Exchange south of Chambers Street in New York City.

23 Eighth. It being the intention of this agreement that the reports and quotations to be furnished by the Stock Exchange to the Telegraph Company shall be substantially such as have been furnished in the past by the Stock Exchange to the Gold and Stock Telegraph Company, and the nature of the business rendering it impossible to insure absolute accuracy or completeness in said re-

ports, it is expressly understood that while the Stock Exchange will use reasonable diligence in collecting and transmitting said reports as fully, completely and accurately as may be practicable, yet it shall not be liable to the Telegraph Company, or any of its customers, for any delays, inaccuracies, errors or omissions in said quotations or reports, or for any damages arising therefrom or occasioned thereby.

Ninth. The parties hereto agree that if any time hereafter, and before the expiration of this contract any dispute or difference shall arise between them concerning the true intent, meaning or construction of anything contained in this contract, or concerning any matter included within the spirit or scope thereof or concerning the acts or omissions of the Stock Exchange or the Telegraph Company, then and so often as a dispute or difference shall arise, any and all such matters in difference shall be submitted and referred to the award and determination of three arbitrators to be chosen one by the Stock Exchange, another by the Telegraph Company, and the third by the two thus chosen, and the decision or award of any two of the arbitrators, in writing, shall be binding and final between the Stock Exchange and the Telegraph Company, and shall be carried out and performed by the said Stock Exchange or the Telegraph Company as the case may be.

Tenth. The provisions of this agreement shall take effect as of the first (1st) day of July, 1892, and shall be and continue
24 in force for and during the full term of five (5) years from said date; and shall further continue after the expiration of said term, from year to year, unless either party shall give written notice of termination at least three months prior to the expiration of said term; and after the close of said fixed term of five years, either party may terminate this agreement at the end of any contract year after having given notice in writing of an intention to do so, at least three months before the close of such contract year.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY,

(Signed) By JNO. VAN HORNE,
*Vice-President.*

(Signed) A. R. BREWER, *Secretary.*

THE NEW YORK STOCK EXCHANGE,

(Signed) By F. K. STURGIS, *President.*

(Signed) GEORGE W. ELY, *Secretary.*

(A True Copy.)

NEW YORK, Nov. 26, 1894.

Gen'l Thomas T. Eckert, President, Western Union Telegraph Company.

DEAR SIR: Referring to our recent interview with you, I beg to submit our understanding of the modification agreed upon in relation to the method of transmission of the quotations of the Exchange to the transmitter located in the building of the Telegraph Company at Number 16 and 18 Broad Street.

It is that the following provisions of Article First of the existing contract dated November 19th, 1892, viz.:

"The Stock Exchange shall furnish booths and instruments on the floor of its Exchange and wires connecting said instruments with the Telegraph Company's wires in the basement of the Exchange or at such other point in said building as may be determined by the Committee of Arrangements of said Exchange; and the Telegraph Company shall be permitted to connect its wires from said building to its commercial news department and its main office, and the Stock Exchange shall by its own operators transmit said reports hereinbefore provided for from said booths on the floor of its said Exchange directly and promptly over its wires, and the Telegraph Company shall receive the same over its said wires by its own operators."

be modified so as to read as follows:

"The Telegraph Company shall run a cable containing wires from its transmitting room at Number 16 and 18 Broad Street, to such place in the building of said Exchange as may be determined by the Committee of Arrangements, and shall furnish in the same place a keyboard connected with said cable by means of which the
25 transmitter located in the building of the Telegraph Company shall be operated."

"The Stock Exchange shall furnish booths and instruments on the floor of its Exchange and wires running from said instruments to a receiving instrument located at said place so to be determined.

"The Stock Exchange shall by its own operators transmit said reports hereinbefore provided for from said booths on the floor of its Exchange directly and promptly over its wires to said receiving instrument. The Telegraph Company shall by its operators take off said reports from said receiving instrument, and then convey the same to its said transmitter by means of the keyboard and cable aforesaid."

If our understanding as above is correct, kindly confirm the same.

Respectfully yours,

(Signed) GEORGE W. ELY, *Sec'y.*

(A True Copy.)

[Letterhead of the Western Union Telegraph Co.]

NEW YORK, November 28th, 1894.

Geo. W. Ely, Esq., Secretary, New York Stock Exchange, New York City.

DEAR SIR: Replying to your note of yesterday, I beg to say that the proposed modification of the first Article of the agreement between your exchange and this company, of November 19th, 1892, which you propose, seems to us to cover the changed conditions of the service on the floor of the exchange, and it is accepted by the Western Union Telegraph Company.

I think that it is unnecessary for us to make a formal supplementary agreement covering this change, and that the filing
27 of your letter with the contract, with a copy of this acceptance, will be quite sufficient.

Yours truly,

(Signed) THOS. T. ECKERT, *President.*

(A True Copy.)

March, 15, 1897.

Thos. T. Eckert, Pres't & Gen'l M'g'r, Western Union Telegraph Company.

DEAR SIR: At a meeting of the Governing Committee of this Exchange, held on February 3d, 1897, the following resolution was unanimously adopted, viz:

"That the New York Stock Exchange hereby elects and determines to terminate on the first day of July 1897, the contract dated November 19th, 1892, between the Western Union Telegraph Company acting for itself and as Lessee of the Gold and Stock Telegraph Company of the first part and the New York Stock Exchange of the second part, and that the Secretary of the Exchange be and he hereby is instructed to transmit a copy of this resolution to said Western Union Telegraph Company at least three months prior to said first day of July 1897."

Please acknowledge the receipt of this communication and oblige.

Yours truly,

(Signed) GEORGE W. ELY, *Sec't'y.*

28 (A True Copy.)

[Letterhead of the Western Union Telegraph Company.]

NEW YORK, March 15th, 1897.

George W. Ely, Esq., Secretary, New York Stock Exchange, New York City.

DEAR SIR: I have to acknowledge receipt of your letter of this day's date, transmitting to me a copy of the resolution of the Gov-

erning Committee of the New York Stock Exchange in which notice is given to the Western Union Telegraph Company, acting for itself and as lessee of the Gold and Stock Telegraph Company, of the intention of the New York Stock Exchange to terminate the agreement of November 19th, 1892, on the first day of July, 1897.

Yours truly,
(Signed) THOS. T. ECKERT,
*President and General M'g'r.*

(A True Copy.)

June 29, 1897.

To the Western Union Telegraph Co.

GENTLEMEN: The contract between the Western Union Telegraph Company and the New York Stock Exchange, dated November 19, 1892, relating to the quotations of the Exchange, will terminate on the 30th day of June, 1897.

Pending the making by the New York Stock Exchange of further or other arangements with respect to its quotations, it is willing to continue said contract in force from day to day, after June 30th, 1897, in consideration of receiving from the Western Union
29 Telegraph Company, for each day during which said contract shall be so continued in force, the sum of $90, payable at the close of business on each day, it being distinctly understood that all the provisions of said contract other than those relating to its duration, are to be and remain in force during such temporary continuation of the contract, but that the New York Stock Exchange or its Committee of Arrangements may at any time and without notice wholly discontinue and terminate said contract, and that upon each discontinuance or termination, all rights of the Western Union Telegraph Company thereunder shall forthwith cease and determine.

Kindly inform us to-day whether you accept the arrangement above proposed.

Respectfully yours,
(Signed) GEORGE W. ELY, *Sec't'y.*

(A True Copy.)

[Letterhead of the Western Union Telegraph Company.]

NEW YORK, June 30th, 1897.

DEAR SIR: We are in receipt of your letter of the 29th instant, notifying the Western Union Telegraph Company that the New York Stock Exchange will continue the operation of the contract of November 19th, 1892. between it and the company from day to day after June 30th, 1897, the company to pay to the Exchange therefor the sum of $90. at the close of business on each day, and the Exchange or its Committee of Arrangements to have the right to discontinue and terminate the said contract at any time without notice.

The Western Union Telegraph Company agrees to this proposal,

reserving to itself, however, the same right of peremptory
30 discontinuance that the Exchange reserves to itself, and subject to the provision, as understood between your Committee of Arrangements and our Mr. Clark, on Monday last, that negotiations to determine the relations between the Exchange and the Company shall be taken up as speedily as possible.

Yours truly,

(Signed) THOS. T. ECKERT, *President.*

George W. Ely, Esq., Secretary, New York Stock Exchange.

(A True Copy.)

June 30, 1897.

Thomas T. Eckert, Esq., President Western Union Telegraph Company.

DEAR SIR: In your acceptance to-day of the proposed arrangement for ticker service contained in my letter to you of 29th inst., you state, "the present conditions of the service to be undisturbed pending such negotiations." As this is contrary to the terms of the agreement, viz: "but that the New York Stock Exchange or its Committee of Arrangements may at any time and without notice wholly discontinue and terminate said contract," etc., we beg that you will withdraw said statement from your letter.

Yours, &c.,

(Signed) GEORGE W. ELY, *Sec'y.*

31 (A True Copy.)

[Letterhead of the Western Union Telegraph Company.]

NEW YORK, June 30th, 1897.

George W. Ely, Esq., Secretary, New York Stock Exchange, N. Y.

DEAR SIR: In compliance with your request of this date, I send you an amended acceptance of the proposition of the Stock Exchange for a day-to-day arrangement with the Western Union Telegraph Company, the last phrase of my letter of this morning ("—the present conditions of the service to be undisturbed pending such negotiations.") being omitted therefrom.

This phrase was put into my first letter in order that the understanding between your Committee of Arrangements and Mr. Clark should be recorded. That understanding was that the service as now performed by us is to be undisturbed during the temporary arrangement to which we agree, but that applications for new service are to be submitted to the Exchange for approval or disapproval as provided in the contract. It is obvious that any differences concerning the present service must form part of the subject of negotiations for a new contract when those negotiations are taken up, and it is only fair to all interests that there should be no misunderstanding as to the continuance by the company of the service now rendered by it,

which it has been agreed is to be undisturbed under this temporary arrangement.

I am, Yours very truly,

(Signed) THOS. T. ECKERT, *President.*

32 (A True Copy.)

[Letterhead of the Western Union Telegraph Company.]

NEW YORK, June 30th, 1897.

DEAR SIR: We are in receipt of your letter of the 29th instant, notifying the Western Union Telegraph Company that the New York Stock Exchange will continue the operation of the contract of November 19th, 1892, between it and the company from day to day after June 30th, 1897, the Company to pay to the Exchange therefor the sum of $90 at the close of business on each day, and the Exchange or its Committee of Arrangements to have the right to discontinue and terminate the said contract at any time without notice.

The Western Union Telegraph Company agrees to this proposal, reserving to itself, however, the same right of peremptory discontinuance that the Exchange reserves to itself, and subject to the provision, as understood between your Committee of Arrangements and our Mr. Clark, on Monday last, that negotiations to determine the relations between the Exchange and the Company shall be taken up as speedily as possible, the present conditions of the service to be undisturbed pending such negotiations.

Yours truly,

(Signed) THOS. T. ECKERT, *President.*

Geo. W. Ely, Esq., Secretary, New York Stock Exchange.

33 EXHIBIT B.

This Agreement, made and entered into this first day of August, Nineteen hundred, by and between The Western Union Telegraph Company, acting for itself and as lessee of the Gold and Stock Telegraph Company hereinafter designated as the "Telegraph Company," party of the first part, and the New York Stock Exchange, hereinafter designated as the "Stock Exchange," party of the second part.

Whereas the Stock Exchange desires to provide for the prompt transmission of the quotations of prices and reports, of transactions occurring upon the New York Stock Exchange, and the Telegraph Company is willing to undertake the same,

Now, therefore, this Agreement witnesseth

That in consideration of the premises and of the mutual covenants and conditions herein contained, the parties hereto have agreed and by these presents do mutually agree to and with each other as follows:

First. The Stock Exchange agrees at its own cost and expense to collect, furnish and transmit to the Telegraph Company, in the manner hereinafter provided, for distribution by the Telegraph Company, as hereinafter provided, full and continuous reports of the current transactions, news, quotations and statistics made or originating in the Stock Exchange, of such stocks, bonds or other securities or properties as are or may be dealt in by the members thereof during the hours for trading prescribed by its rules, and also the changes which may occur in the same from time to time.

Said reports shall embrace such quotations and other information as have heretofore been usually delivered by said Ex-
34 change to the Telegraph Company, and while the Stock Exchange does not guarantee that the same shall be absolutely accurate, or shall embrace all the transactions occurring or originating in said Exchange, it will, nevertheless, use reasonable diligence to make the same as full, complete and accurate as may be practicable.

The Telegraph Company shall run and maintain a cable containing wires from its transmitting room to such place in the building occupied by said Exchange as may from time to time be determined by the Committee of Arrangements of the Stock Exchange, and shall furnish in the same place a keyboard connected with said cable by means of which the transmitter located in the building of the Telegraph Company shall be operated.

The Stock Exchange shall furnish booths and instruments on the floor of the Exchange, and wires running from said instruments to a receiving instrument located at said place so to be determined.

The Stock Exchange shall, by its own operators, transmit said reports hereinbefore provided for from said booths on the floor of the Exchange directly and promptly over its wires to said receiving instrument. The Telegraph Company shall, by its operators, take off said reports from said receiving instrument and then convey the same to its said transmitter by means of the keyboard and cable aforesaid.

The wires of the Telegraph Company connecting with those of the Exchange shall not be connected with any other wires by repeater or any other device.

The Telegraph Company further agrees that the wires over which said reports are transmitted to its said main office shall be so arranged and protected as to render the same, as far as possible, incapable of being tapped, and that the Telegraph Company will use its utmost endeavors to prevent said reports, or any part thereof, being taken off said wires, or in any way diverted or distributed prior to their reaching said transmitter. So long as the New
35 York Quotation Company shall be employed by the Stock Exchange for the transmission of said reports to any person or persons, the transmission of such reports to the Telegraph Company shall be simultaneous with, and shall be performed in like and equal manner and time with their transmission to the New York Quotation Company, and no preference shall be given either Company in such service.

Second. The Telegraph Company shall have the right to transmit said reports to members of the New York Stock Exchange at their offices north of Chambers Street in New York City, and shall also have the right to serve said reports to each Director of the Telegraph Company who is a member of the Stock Exchange on one ticker in the office of any such director located south of Chambers Street, but said Telegraph Company shall not serve said reports to any members of the Stock Exchange except as herein provided.

The Telegraph Company shall charge members of the Stock Exchange for the use of tickers delivering such reports in their offices north of Chambers Street, and south of Sixtieth Street in New York City, not exceeding Twenty-five (25) Dollars per month for each ticker.

The Telegraph Company shall also have the right to serve said reports to all persons, firms, corporations and organizations in New York City and elsewhere whenever the Telegraph Company may desire to serve them, excepting to organizations or Exchanges in the City of New York competing with the New York Stock Exchange, and except to members of the Stock Exchange south of Chambers Street in New York City, and except to persons who may be directly or indirectly engaged in the promotion or maintenance of bucket-shops; provided, however, that the Telegraph Company will not contract to furnish tickers, and will not furnish tickers to any person, firm, corporation or organization in New York City not
36 already having its instruments, until the application of such person, firm, corporation or organization shall have been submitted to and approved by at least three members of the Committee of Arrangements of the Stock Exchange, and as their existing contracts expire from time to time, it will not make renewals thereof, or continue to furnish service to such parties in New York City until their respective applications for such renewals have been in like manner submitted and approved; but these provisions shall be construed liberally to the Telegraph Company to the end that its service of and revenue from such reports shall not be unreasonably restricted, and that its patrons shall not be embarrassed. Such applications shall be acted upon promptly by said Committee of Arrangements.

The Telegraph Company shall not be required to remove any of its tickers which are under restraint by injunction of the courts during the pendency of such injunction, but diligent efforts shall be made by the Telegraph Company to secure the removal of such injunctions at its own cost and expense in cases where the Stock Exchange may so desire or request. In the event that the Stock Exchange shall be dissatisfied with the conduct of the defense by the Telegraph Company in any such suit or action, the Stock Exchange shall, upon demand, have the right to conduct such defense by counsel of its own selection, in the name and at the expense of the Telegraph Companpy.

Third. Except for the purpose of distribution to members of the Stock Exchange south of Chambers Street in New York City by the

New York Quotation Company, or by such other instrumentality as the Stock Exchange shall from time to time select, and for the distribution in the City of Boston by the United Telegram Company, the Stock Exchange agrees that during the term of this contract it will not grant the privilege of receiving and transmitting,
or using, nor will it furnish to any person, party, firm or
37 corporation other than the Telegraph Company any quotations, reports, news or statistics of transactions, trades or dealings on said Exchange, nor will the Stock Exchange (so far as it can lawfully prevent the same) permit, suffer or allow any of its members to receive, use, transmit, distribute or deliver for sale or distribution any of the said quotations, reports, news or statistics of transactions, trades or dealings on said Stock Exchange, nor will said Stock Exchange do any act whereby any other person, firm or corporation than the Telegraph Company party hereto (except as above mentioned) shall acquire any right to receive, use, transmit, distribute or deliver for sale or distribution, any of the said quotations, reports, news or statistics of transactions, trades or dealings on said Stock Exchange; but nothing herein contained shall be construed to apply to the publication and distribution by other than electrical devices of quotation sheets and price lists of transactions on said Exchange.

For the purpose of protecting the Telegraph Company against the use of any quotations, reports, news or statistics of the Stock Exchange by parties not entitled to them the Telegraph Company may prosecute by suit, injunction or other legal remedies proper and suitable for the prevention or stoppage of such competitive use, either in its own name or in the name of the Stock Exchange, or its proper officers, any party or parties obtaining or using said quotations, reports, news or statistics not entitled to them, whether obtained from the Stock Exchange or its members, or employees, or otherwise, and in case the Telegraph Company shall sue and proceed in the name of the Stock Exchange, the Stock Exchange shall, by its proper officers, do all such proper acts and things and sign all such proper and necessary papers in order to enable the Telegraph Company to conduct proceedings with due diligence and effect. All such suits and other legal proceedings, whether
38 carried on by the Telegraph Company in its own name, or in the name of the Stock Exchange, shall be at the sole cost and expense of the Telegraph Company, and the Telegraph Company agrees to indemnify and save harmless the Stock Exchange of and from all damages, expenses, costs, charges and fees incurred in or arising out of any such suit or proceeding.

Fourth. As compensation for the privilege of receiving said quotations and reports for distribution as aforesaid, hereby granted by the Stock Exchange to the Telegraph Company, the Telegraph Company agrees to pay to the Stock Exchange the sum of Twenty-seven thousand Dollars ($27,000) per annum, in equal installments of Two thousand two hundred and fifty dollars ($2,250) at the close of each month until the 30th day of April in the year 1902, and thereafter the sum of One hundred thousand dollars ($100,000)

per annum in equal installments of Eight thousand three hundred and thirty-three and 33/100 dollars ($8,333.33) at the close of each month until the 30th day of April, 1907, and in case the Telegraph Company shall make default in the payment of any such installment for the period of five days after the same becomes due, the Stock Exchange may forthwith terminate such privilege without notice.

In case the Stock Exchange shall at any time during the continuance of this agreement refuse to all other parties the right to receive, use, transmit and deliver its quotations, news and statistics in the City of Boston, and shall grant such privilege in Boston exclusively to the Telegraph Company party hereto, then and from thenceforth for so long, during the continuance of this agreement, as said exclusive privilege for the said City of Boston is continued by said Stock Exchange to the Telegraph Company party hereto, the monthly payments herein provided to be made by the Telegraph Company to the Stock Exchange shall be increased by the sum of Two hundred and fifty Dollars ($250) per month, if the
39 same shall occur prior to April 30th, 1902, and by the sum of One thousand Dollars ($1,000) per month if the same shall occur thereafter.

Fifth. For the purposes of this agreement the term "member of the Stock Exchange" shall be construed to include any firm, one or more of whose members are members of the Stock Exchange.

Sixth. The Telegraph Company party hereto agrees for itself and the Gold and Stock Telegraph Company, on the one side, and the Stock Exchange agrees for the New York Quotation Company, on the other, that any improvements on the instruments now in use by either of the said Companies which may be owned and introduced in the ticker service in New York City during the continuance of this contract by either of the said Companies, may be used by the other of said Companies in New York City during the continuance of this agreement, free of charge, and in case any such improvement shall be introduced by either Company under a license or other arrangement short of ownership of the patent covering the same, the Company availing itself of such license or other arrangement shall procure a similar license or other arrangement for the other Company, to continue during the existence of this contract, in which case each Company shall pay royalty under such license in the proportion that the number of its instruments using such improvement bears to the whole number of instruments of both parties on which such improvement is used, and in default thereof shall not be at liberty to use such improvement in its own service.

In case additional corporate action shall be required by any of the parties, such further action shall be obtained and such further agreement shall be executed as may be necessary for the carrying out of this provision according to its true intent, so that the actual expense and royalty, under the license or other arrangement,
40 incurred by the Company introducing the improvement shall be the measure of compensation to be paid by the other.

Seventh. The provisions of this agreement applicable to the New

York Quotation Company shall apply from time to time to such other Company, if any, as shall be substituted by the Stock Exchange for the said Quotation Company for serving its quotations, news and statistics to the members of said Stock Exchange south of Chambers Street in New York City.

Eighth. It being the intention of this agreement that the reports and quotations to be furnished by the Stock Exchange to the Telegraph Company shall be substantially such as have been furnished in the past by the Stock Exchange to the Gold and Stock Telegraph Company and to the Telegraph Company party hereto, and the nature of the business rendering it impossible to insure absolute accuracy or completeness in said reports, it is expressly understood that while the Stock Exchange will use reasonable diligence in collecting and transmitting said reports as fully, completely and accurately as may be practicable, yet it shall not be liable to the Telegraph Company or any of its customers for any delays, inaccuracies, errors or omissions in said quotations or reports, or from any damage arising therefrom or occasioned thereby.

Ninth. The parties hereto agree that if at any time hereafter, and before the expiration of this contract, any dispute or difference shall arise between them concerning the true intent, meaning or construction of anything contained in this contract, or concerning any matter included within the spirit or scope thereof, or concerning the acts or omissions of the Stock Exchange or the
41 Telegraph Company, then so often as a dispute or difference shall arise any and all such matters in difference shall be submitted and referred to the award and determination of three arbitrators to be chosen, one by the Stock Exchange, another by the Telegraph Company and the third by the two thus chosen, and the decision or award of any two of the arbitrators in writing shall be binding and final beween the Stock Exchange and the Telegraph Company and shall be carried out and performed by the said Stock Exchange or the Telegraph Company, as the case may be.

Tenth. The provisions of this agreement shall take effect immediately and shall be and continue in force until and including the 30th day of April, in the year 1907.

In witness whereof The Telegraph Company has caused these presents to be executed by its President and its corporate seal to be hereto affixed, and the Stock Exchange has caused the same to be executed by its President and Secretary, the day and year first above written.

[SEAL] THE WESTERN UNION TELEGRAPH COMPANY,
By THOS. T. ECKERT, *President.*

J. C. WILLEVER, *Acting Secretary.*

NEW YORK STOCK EXCHANGE,
By RUDOLPH KEPPLER, *President.*
WM. McCLURE, *Secretary.*

42 *Extracts from the Minutes of the Meeting of the Governing Committee, April 24, 1907.*

"Whereas, the agreement between this Exchange and the Western Union Telegraph Company, acting for itself and as lessee of the Gold and Stock Telegraph Company for the transmission of quotations of prices, and reports of transactions occurring upon said Exchange, dated August 1, 1900, will terminate on April 30th inst., therefore

"Resolved, that the Committee of Arrangements be empowered to notify the said Western Union Telegraph Company that, on and after May 1st next, the present contract will be continued from day to day only, and will be terminable, at the option of either party, at the end of any day, with or without notice.

43 (A true copy.)

APRIL 25, 1907.

Robert C. Clowry, Esq., President Western Union Telegraph Company.

DEAR SIR: I am instructed by the Committee of Arrangements to forward to you a copy of preamble and resolution adopted by the Governing Committee of this Exchange on Wednesday, April 24th inst., and to request you to consider this the notification mentioned therein.

Said preamble and resolution are as follows:

Whereas, the agreement between this Exchange, and the Western Union Telegraph Company, acting for itself and as lessee of the Gold and Stock Telegraph Company for the transmission of quotations of prices and reports of transactions occurring upon said Exchange, dated August 1, 1900, will terminate on April 30th inst., therefore

Resolved, that the Committee of Arrangements be empowered to notify the said Western Union Telegraph Company that, on and after May 1st next, the present contract will be continued from day to day only, and will be terminable, at the option of either party, at the end of any day, with or without notice.

Respectfully,

(Signed) GEORGE W. ELY, *Secretary.*

44 EXHIBIT C.

*Agreement Between New York Stock Exchange and The Western Union Telegraph Company.*

45 This Agreement, made this first day of July, in the year One thousand nine hundred and fourteen, by and between The Western Union Telegraph Company, acting for itself and as the lessee of the Gold and Stock Telegraph Company, hereinafter designated as "The Telegraph Company," party of the first part, and the

New York Stock Exchange, hereinafter designated as the "Exchange," party of the second part, witnesseth:

That in consideration of the premises and of the mutual covenants and conditions herein contained, the parties hereto have agreed, and by these presents do mutually agree, to and with each other as follows:

First. The Exchange agrees, at its own expense, to furnish to the Telegraph Company, under the limitations, conditions and restrictions hereinafter prescribed, full and continuous quotations of prices made in transactions upon the Exchange. The quotations so furnished shall include substantially such quotations and other information as have heretofore been furnished by the Exchange to the Telegraph Company under the contract heretofore subsisting between them. The Exchange does not guarantee the accuracy or completeness of said quotations, but undertakes to use reasonable diligence to make the same accurate and complete as may be practicable; it being distinctly understood and agreed, however, that the Exchange shall not be liable to the Telegraph Company or to any of the persons to whom it may furnish the same, or to any other person whatsoever, for any inaccuracies, errors, or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

Second. The transmitter of the Telegraph Company operating its own or Gold and Stock tickers in the City of New York shall be located in the room in the basement of the building occu-
46 pied by the Exchange heretofore and now used by the Telegraph Company as its transmitting room.

The Telegraph Company shall run and maintain a cable containing wires from its said transmitting room to such place in said building as may be from time to time designated by the Exchange; and shall furnish in the same place a keyboard connected with said cable, by means of which the transmitter located in the said transmitting room shall be operated.

The Exchange shall maintain Morse telegraph instruments on the floor of the Exchange and a wire running from each of said instruments to a receiving Morse instrument at said keyboard; and shall by its own operators transmit said quotations directly and promptly over said wires to said receiving instrument, or such transmission may be by such other means as may be hereafter mutually agreed upon. The Telegraph Company shall by its own operators take off from the said receiving instrument the said quotations, and transmit the same to its said transmitter by means of the keyboard and cable aforesaid. The wires of the Telegraph Company connecting the said keyboard with said transmitter shall not be connected with any other wires by repeater or any other device.

The Telegraph Company shall so arrange and protect the wires over which said quotations are sent to said transmitter, and the wires over which the same are sent from said transmitter to its own or the Gold and Stock tickers connected therewith, that said wires so far as possible cannot be tapped, or said quotations taken off said wires, or in any way communicated otherwise than through

said tickers. No tickers shall be connected with, or operated from, said transmitter except Western Union or Gold and Stock tickers located in the offices of persons to whom the Telegraph Company furnishes said quotations after full compliance with the limitations, conditions and provisions of this contract; and one ticker located in said transmitting room of the Telegraph Com-
47 pany and one or more tickers located in the relaying rooms of the Telegraph Company. The Telegraph Company may furnish said quotations, or any part thereof, or any information therein contained, to its patrons by means of tickers, or by telegraph or telephone wires and instruments, or may deliver them by messengers or otherwise as it may elect, subject to the limitations, conditions and provisions hereinafter contained. The Telegraph Company in relaying said quotations shall use its best efforts to prevent the tapping of any wire or wires over which the same are transmitted, and to prevent any person, other than those to whom it furnishes the same, after full compliance with the limitations, conditions and provisions hereof, from obtaining the same from it or from any of its employees.

The relaying rooms of the Telegraph Company in New York City shall be located at the offices of the Telegraph Company in the Walker Lispenard Building, 24 Walker Street, or at such other place or places as may be mutually agreed upon by the parties hereto. At any and all reasonable times properly accredited persons designated by the Exchange shall have access to said relaying rooms, and also all relaying rooms in other cities and test rooms through which wires used in transmitting said quotations pass, and the right to examine, in the presence of the Telegraph Company's officials in charge thereof, all appliances, and observe all operations located or carried on therein. Otherwise no one shall be authorized to have access to the quotations in said relaying rooms during business hours, except the officers of the Telegraph Company and its employees engaged in relaying or handling said quotations. No quotations shall be relayed from the transmitting room of the Telegraph Company in the building occupied by the Exchange. At any and all reasonable times properly accredited persons designated by the Exchange shall have access to said transmitting room
48 of the Telegraph Company, and the right to examine, in the presence of the Company's officials in charge thereof, all appliances and to observe all operations therein.

Neither said quotations, nor any part thereof, nor any information therein contained, shall be furnished by the Telegraph Company or its employees to any person or in any manner except as herein provided.

None of said quotations shall be sent out by the Telegraph Company except those sent over ticker circuits connected with the transmitter located in the basement of the Stock Exchange, or by relaying from a ticker connected with said transmitter.

Third. So long as the New York Quotation Company shall furnish the quotations of the Exchange to any person or persons the furnishing of such quotations to the Telegraph Company shall be simultaneous with, and performed in like and equal manner, and

time, as in the case of the New York Quotation Company; and no preference shall be given either Company with respect thereto. The provisions of this agreement applicable to the New York Quotation Company shall apply from time to time to such other Company, if any, as shall be substituted by the Exchange for the said Quotation Company for furnishing its quotations to members of said Exchange in that portion of the Borough of Manhattan south of Chambers Street.

Fourth. The Telegraph Company may furnish said quotations to any person whether a member of the Exchange or not anywhere in the United States or Canada outside of that portion of the Borough of Manhattan lying south of Chambers Street; and may also furnish the same by ticker to any person who is not a member of the Exchange, and to each director of the Telegraph Company who is also a member of the Exchange, at his or their office
49 or offices in the Borough of Manhattan south of Chambers Street; provided, however, that the Telegraph Company shall not after the first day of November, 1914, furnish quotations, by ticker or otherwise, in the volume of a continuous service, which is defined to be oftener than at intervals of fifteen (15) minutes (and is herein referred to as continuous quotations) to any subscriber therefor unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company, and the subscriber shall have been approved by the Exchange, the said application to be substantially as follows:

"Application to The Western Union Telegraph Company for Continuous Quotations.

——, ——, 19—.

The Western Union Telegraph Company:

We hereby apply to you for a service of continuous quotations of the New York Stock Exchange, furnished you under contract between you and said Exchange, said quotations to be furnished to us at —— by ——; and we represent and agree with you as follows:

(1) That our business is and shall be the business of —— and that said business is conducted under the firm name and style of —— and that notice of any change of the name, nature or place of said firm or business shall at once be given to the said Western Union Telegraph Company; and that we are not keeping or causing to be kept, and will not keep or cause to be kept, or be in any wise interested in, or in any way assist or promote, any bucket-shop or bucket-shop business, or any office, store or other place wherein is conducted or permitted the business of making, or offering to make, contracts, agreements, trades or transactions, either orally or in writing, respecting the purchase or sale (or the purchase and sale) of any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or
50 conducting such business, or the undersigned, contemplate or intend that such contracts, agreements, trades or transactions shall, or may be, closed, adjusted or settled according, or with reference, to the quotations of any Exchange, Board of Trade,

or market place, upon which stocks, bonds or other securities or commodities are dealt in; or otherwise than by an actual bona fide transaction or purchase or sale; or wherein both parties or the party maintaining such office or place or conducting such business or the undersigned contemplate or intend that such contracts, agreements, trades or transactions shall, or may, be closed or terminated when the quotations of some such Exchange, Board of Trade or market place respecting the stocks, bonds or other securities or commodities specified in such contracts, agreements, trades or transactions shall reach a certain figure; and we agree that we will not use, or allow anyone else to use, such quotations or any of them for any such purpose or in any such bucket-shop, office or place.

(2) That said quotations are to be received by us only for our private and individual use in our said business at the office or place above designated; and that we will not communicate or otherwise furnish or permit to be communicated or otherwise furnished said quotations to any news distributing company or telegraph company, or any person or corporation, nor to any other place than that above designated, nor allow any person or corporation whatsoever to take directly or indirectly said quotations from said office. But nothing herein contained shall preclude us from furnishing said quotations to any branch office of ours, nor to any of our correspondents, provided that said branch office or offices shall first be approved by the New York Stock Exchange, and further provided that before furnishing said quotations to any such correspondent such correspondent shall be approved by the New York Stock Exchange, and we shall first obtain in duplicate (one of which shall be delivered to you and one to the New York Stock Exchange) an agreement signed by such correspondent in which said correspondent shall agree with the Western Union Telegraph Company to abide by and comply with clauses 1, 2, 3, 4 and 7 hereof. If the undersigned shall furnish, or permit to be furnished, said quotations, or any of them, to any person, firm or corporation, excepting after compliance with the provisions hereinbefore contained, the undersigned hereby agrees that the
51 Western Union Telegraph Company may sue the person, firm or corporation to whom said quotations or any of them are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making the undersigned a defendant thereto, provided the undersigned does not, or in cases of a partnership all the members thereof do not, reside within the jurisdiction of the Court in which said suit is brought.

(3) That the office or place above designated shall not be connected by any private telegraph or telephone wire, or other wire connection, or other means of communication, with the office or place of business of any person or persons, or corporation, engaged in the business of making contracts, agreements, trades or transactions respecting the purchase and sale of stocks, bonds or other securities or commodities, or with any place where such business is conducted, unless the New York Stock Exchange shall have been notified of such connection and shall not have disapproved the same; nor with any branch office or correspondent excepting such

branch offices and correspondents as have been approved by the New York Stock Exchange as provided in Clause 2 hereof. But nothing in this clause contained shall be construed as applying to the private wire connections of members of the New York Stock Exchange which have been approved in conformity with its rules.

(4) That at any and all times any person or persons designated by the said Telegraph Company or the said New York Stock Exchange shall have access to the office or place above designated, and the right to observe the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service in said office or place.

(5) That the Western Union Telegraph Company may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements or any of them by the undersigned, or whenever directed so to do by said New York Stock Exchange.

(6) That the Western Union Telegraph Company shall not be pecuniarily liable for the accuracy of the quotations which it may furnish under this application, nor for any delays, inaccuracies, errors or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

(7) That quotations upon any stock, bond or other security at intervals of fifteen (15) minutes or less shall be deemed to
52 be continuous quotations within the meaning of this application.

——— ———.

Accepted:

THE WESTERN UNION TELEGRAPH COMPANY,

By ——— ———.

Applicant approved:

NEW YORK STOCK EXCHANGE,

By ——— ———."

One of said applications when signed shall be delivered to the Exchange; but said application and the acceptance thereof by the Telegraph Company shall not be effectual for any purpose until the subscriber is approved by the Exchange. Notice shall be promptly given by the Exchange of its approval or disapproval of the applicant.

It is understood and agreed, however, that the Telegraph Company may furnish any quotations furnished to it hereunder to its patrons at intervals of more than fifteen (15) minutes without requiring such patrons to sign said application form; but the Telegraph Company shall furnish to the Exchange a list of such patrons monthly, and shall discontinue such service to any thereof to whom the Exchange may object.

Fifth. The Telegraph Company shall as soon as practicable fur-

nish to the Exchange a list of all persons to whom it is now furnishing continuous quotations of the Exchange under subsisting contracts, with the full names, addresses and business occupations of said persons; and shall at reasonable intervals of time, when requested so to do by the Exchange, furnish the Exchange with a complete list of persons to whom it is then furnishing said continuous quotations, together with similar information in respect to them.

53 Sixth. The Telegraph Company agrees that it will use its best efforts to prevent any persons, other than those approved by the Exchange as hereinbefore provided from obtaining said quotations; and that in case said quotations are obtained by persons not so approved it will use its best endeavors to ascertain the source from which the same are obtained, and to inform the Exchange fully in respect thereto. The Telegraph Company further agrees that in case any person shall fail to comply with any of the conditions, restrictions and limitations contained in the application signed by him as hereinbefore provided, it will at its own risk, cost and expense terminate the contract between him and it and the furnishing of said quotations to him thereunder.

In case any suit or legal proceeding is brought to enjoin the Telegraph Company from refusing to furnish quotations to any person, the Telegraph Company shall at once inform the Exchange of such suit or proceeding, and shall permit the Exchange to intervene therein, or to defend the same in the name of the Telegraph Company; but, in such cases, the Exchange shall indemnify the Telegraph Company against and save it harmless from any and all costs and damages awarded against it.

In case the Exchange institutes any suit or proceeding to enjoin any person not entitled to said quotations from obtaining or using the same, the Telegraph Company will co-operate with and assist the Exchange in its prosecution; and whenever requested so to do by the Exchange, and indemnified against any cost or liability which it may thereby incur, it will institute in its name, or permit the Exchange to institute in the name of the Telegraph Company, any action or proceeding to prevent any person not entitled to said quotations from obtaining or using the same. The Telegraph Company shall, unless enjoined by any Court from doing so, discontinue furnishing said quotations to any person whether a

54 member or non-member of the Exchange whenever notified by the Exchange of its disapproval of such person, but in all cases of discontinuance, pursuant to notice given by the Exchange, the Exchange shall indemnify and save harmless the Telegraph Company from all costs, damages or liability which it may incur by reason of such discontinuance.

Seventh. The charge made by the Telegraph Company to members of the Exchange for furnishing the continuous quotations aforesaid to the offices of such members in the Borough of Manhattan north of Chambers Street and south of Sixtieth Street, by means of tickers located in such offices, shall not exceed twenty-five Dollars (25) a month for each ticker. The charge made by the Tele-

graph Company for furnishing said quotations to members of the Exchange wherever located shall not in any case exceed the charge for such service made to any non-member similarly located.

Eighth. The Telegraph Company agrees to pay to the Exchange at the rate of fifty thousand dollars ($50,000) per annum during the continuance of this agreement, in equal monthly installments of four thousand one hundred sixty-six and 67/100 Dollars ($4,166.67) on the last day of each month.

Ninth. The parties hereto agree that if at any time hereafter any difference or dispute shall arise between them concerning the true intent, meaning or construction of anything contained in this contract, or concerning any matter included within the spirit or scope thereof, or concerning the acts or omissions of the Exchange or the Telegraph Company in connection with the performance thereof, then, so often as a dispute or difference shall arise, any and all such matters in difference shall be submitted and referred to the
55 award and determination of three arbitrators to be chosen one by the Exchange, another by the Telegraph Company, and a third by the two thus chosen; and the decision or award of any two of the arbitrators in writing shall be binding upon, and final between, the Exchange and the Telegraph Company, and shall be carried out and performed by the said Exchange or Telegraph Company, as the case may be.

Tenth. Nothing herein contained shall be construed to entitle the Telegraph Company to furnish said quotations to Members of the Exchange in the Borough of Manhattan south of Chambers Street, excepting directors of the Telegraph Company who are members thereof. The Exchange reserves the right to contract with any other Telegraph Company to furnish said quotations to it; but in case it shall enter into any such contract or contracts the quotations furnished thereunder shall be identical with the quotations furnished to the Telegraph Company pursuant to the provisions hereof, and shall be furnished to the Telegraph Company simultaneously with the furnishing thereof to such other company or companies, and shall be furnished to such other company or companies, subject to limitations, conditions and restrictions substantially identical with those prescribed by this agreement.

In the event that the price charged any such other Company by the Exchange for furnishing it with said quotations shall bear a less proportion to the gross revenue obtained by such other Company from its subscribers for furnishing them said quotations than the price herein stipulated to be paid by the Telegraph Company bears to the gross revenue obtained by it from its subscribers, the price to be paid by the Telegraph Company shall be reduced so that the proportion in its case shall not exceed the proportion in the case of the other Company. This provision shall not be con-
56 strued to refer to the service of the New York Quotation Company to members of the Exchange south of Chambers Street in the Borough of Manhattan.

Eleventh. It is understood and agreed that as to the right of the Exchange, hereinbefore specified, to disapprove applicants for quo-

tations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations.

Twelfth. This agreement shall take effect on the first day of July, 1914, and shall continue in force until and including the 30th day of June, 1915; and shall continue in force thereafter until the expiration of thirty days after written notice shall have been given by either party to the other terminating the same.

Thirteenth. Whenever the word "person" or "persons" or "non-member" or "non-members" is used herein it shall be deemed to include firms, corporations and associations as well as natural persons. The term "member of the Exchange" shall be construed to include any firm one or more of whose members are members of the Exchange.

Wherever, by the terms hereof, any action, approval or disapproval of the Exchange is authorized or required, the written statement of the Secretary or the Assistant Secretary of the Exchange with respect thereto, shall be sufficient evidence thereof.

In witness whereof, the Telegraph Company has caused these presents to be executed by its Vice-President, and its corporate seal to be hereto affixed, and the Stock Exchange has caused the
57 same to be executed by its President, and Secretary, the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY,

(Signed) By G. W. E. ATKINS,

*Vice-President.*

Attest:

(Signed) WM. H. BAKER, *Secretary.*

NEW YORK STOCK EXCHANGE,

(Signed) By H. G. S. NOBLE, President.

Attest:

(Signed) GEORGE W. ELY, *Secretary.*

58 EXHIBIT 4.

Public Service Commission of Massachusetts.

In the Matter of the Complaint of CALVIN FOSTER against United Telegram Company and Gold & Stock Telegraph Company.

To the Honorable Members of the Public Service Commission of the State of Massachusetts:

The United Telegram Company has received a copy of the complaint of Mr. Calvin Foster embodied in his letter to your Honorable Commission, dated March 3rd, 1915, making certain statements concerning the United Telegram Company and the Gold & Stock Telegraph Company, alleged to be Companies engaged in

furnishing quotations of the New York Stock Exchange for distribution in the City of Boston. The United Telegram Company desires to communicate to your Honorable Commission the facts respecting the matter and states that it has no connection whatever with the Western Union Telegraph Company or with the Gold & Stock Telegraph Company.

The United Telegram Company in answer to said complaint begs to state that it is advised that the whole matter is within the sole jurisdiction of the Interstate Commerce Commission and therefore not subject-matter of which your Honorable Commissioner can take cognizance.

In order that the matter may be presented in all its aspects and in order that your Honorable Commission may be fully advised of all the facts arising in connection with said complaint, said United Telegram Company begs to state:—

The United Telegram Company receives from the New York Stock Exchange in the City of New York, and State of New York, quotations of dealings on the New York Stock Exchange, for transmission to subscribers therefor in the City of Boston, Massachusetts, under and pursuant to a contract of which a copy is hereto annexed and marked Exhibit "A," executed on or about November 14, 1914.

The New York Stock Exchange for many years has been and is now a voluntary, unincorporated association having control of the building in which it is located and upon the floor of which the rules established by it the 1100 members deal with each other in selling and buying securities either on behalf of the mem-
59 bers or on behalf of individuals employing them to act as brokers in buying and selling stocks and bonds dealt in upon said Exchange. The quotations which the United Telegram Company receives from the Stock Exchange and delivers as hereinbefore set forth are collected by the New York Stock Exchange through its own employees on the floor of said Exchange to which floor no one except the members of said Exchange and its employees have access. Said quotations are the property of the said Exchange and are delivered to the United Telegram Company to be transmitted by it and delivered to such persons and to such persons only as are approved by the New York Stock Exchange in the manner provided in the contract of which a copy is hereto annexed and marked Exhibit "A."

The New York Stock Exchange has never approved the application of Mr. Calvin Foster as provided in said contract Exhibit "A" but on the contrary has notified the United Telegram Company that it does not approve his application, a copy of said notice being hereto annexed and marked Exhibit "B."

The United Telegram Company further says that in the absence of the approval of the New York Stock Exchange, it has no right to furnish the quotations of the New York Stock Exchange to Calvin Foster and that should your Honorable Commission make an order requiring it to furnish such quotations to him, such order would in effect require the United Telegram Company to appropriate the

property of the New York Stock Exchange for the benefit of Calvin Foster, and would result in the destruction of the United Telegram Company's contract with the New York Stock Exchange contrary to the provisions of the Federal Constitution in that the United Telegram Company would thereby be deprived of its property without due process of law.

The United Telegram Company denies the complainant's allegation that everybody wishing a ticker in the City of Boston except complainant has had his application granted. It has no information as to the statement contained in the complainant's letter of March 3rd as to his business relations in Boston and must therefore — him to such proof thereof as the Commission may require.

Wherefore, said complaint should be dismissed,

First, for the reason that your Honorable Commission is without jurisdiction over the matter stated in said complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress.

Second, for the reason that the United Telegram Company has no legal right to deliver the quotations of the New York Stock Exchange to any persons other than those approved by the
60 New York Stock Exchange as provided in the contract hereto annexed and marked Exhibit "A."

Respectfully submitted,

UNITED TELEGRAM COMPANY,
C. F. PARKER, *President.*

[A.]

This Agreement, made and entered into this first day of October, 1914, between The United Telegram Company, hereinafter designated as "The Telegram Company" and the New York Stock Exchange, hereinafter designated as "The Exchange,"

Witnesseth:

First. The Exchange agrees to furnish to the Telegram Company under the limitations, conditions and restrictions hereinafter prescribed, full and continuous quotations of prices made in transactions upon the Exchange. The quotations so furnished shall include substantially such quotations and other information as have heretofore been furnished by the Exchange to the Telegram Company under the contract heretofore subsisting between them. The Exchange does not guarantee the accuracy or completeness of said quotations, but undertakes to use reasonable diligence to make the same as accurate and complete as may be practicable; it being distinctly understood and agreed, however, that the Exchange shall not be liable to the Telegram Company, or to any of the persons to whom it may furnish the same, or to any person whatsoever, for any inaccuracies, errors, or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

Second. Said quotations shall be furnished to the Telegram Company by means of a New York Quotation Company ticker installed

in the office of the Postal Telegraph Cable Company, at No. 18 Broadway, Borough of Manhattan, City of New York, simultaneously with the furnishing thereof to subscribers for the ticker service of the said New York Quotation Company, except in so far as the furnishing thereof as aforesaid is prevented by accident to apparatus, or any accident beyond the control of the Exchange.

Third. The Telegram Company agrees that no one shall have access to the quotations at the said office of the Postal Telegraph Company, except the employees of the Telegram Company or of said Telegraph Company engaged in relaying or handling said
61 quotations, and that neither said quotations nor any part thereof, nor information therein contained, shall be furnished by the Telegram Company or its employees, or by the Postal Telegraph Company or its employees to any person or in any manner except as herein provided, and that at any and all reasonable times, properly accredited persons designated by the Exchange shall have access to the said office of the Postal Telegraph Company where said ticker is installed, and also all relaying rooms in other cities and test rooms through which wires used in transmitting said quotations pass, and the right to examine in the presence of the Postal Telegraph Company's officials in charge thereof, all appliances, and observe all operations located or carried on therein. The Telegram Company further agrees that it will contemporaneously with the execution hereof by the Stock Exchange procure an agreement from the Postal Telegraph Company, whereby the said Postal Telegraph Company will obligate itself to do any and all things which on its part are necessary to be done, in order to enable the Telegram Company to carry out its covenants aforesaid.

Fourth. The Telegram Company may furnish said quotations to its subscribers at their offices in the City of Boston, State of Massachusetts, provided, however, that the Telegram Company shall not after the first day of — 1914, furnish quotations by ticker or otherwise in the volume of a continuous service, which is defined to be oftener than at intervals of fifteen (15) minutes, (and is herein referred to as continuous quotations) to any subscriber thereof, unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegram Company, and the subscriber shall have been approved by the Exchange, the said application to be substantially as follows:—

*"Application to the United Telegram Company for Continuous Quotations.*

— 19—.

The United Telegram Company:

We hereby apply to you for a service of continuous quotations of the New York Stock Exchange, furnished you under contract between you and said Exchange, said quotations to be furnished to us at —— by —— ——: and we represent and agree with you as follows:—

(1) That our business is and shall be the business of —— and that said business is conducted under the firm name and style of —— and that notice of any change of the name, nature or place of said firm or business shall at once be given to the said United Telegram Company; and that we are not keeping or causing
62 to be kept, and will not keep or cause to be kept, or be in any wise interested in, or in any way assist or promote, and bucket-shop or bucket shop business, or any office, store or other place wherein is conducted, or permitted the business of making, or offering to make contracts, agreements, trades or transactions, either orally or in writing, respecting the purchase or sale (or the purchase and sale), of any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or conducting such business, or the undersigned, contemplate or intend that such contracts, agreements, trades or transactions shall, or may be, closed, adjusted, or settled according, or with reference, to the quotations of any Exchange, Board of Trade, or market place, upon which stocks, bonds, or other securities or commodities are dealt in; or otherwise than by an actual bona fide transaction or purchase or sale; or wherein both parties or the party maintaining such office or place or conducting such business or the undersigned contemplate or intend that such contracts, agreements, trades or transactions shall, or may, be closed or terminated when the quotations of some such Exchange, Board of Trade or market place respecting the stocks, bonds or other securities or commodities specified in such contracts, agreements, trades or transactions shall reach a certain figure; and we agree that we will not use or allow any one else to use, such quotations or any of them for any such purpose or in any such bucket shop, office or place.

(2) That said quotations are to be received by us only for our private and individual use in our said business at the office or place above designated; and we will not communicate or otherwise furnish or permit to be communicated or otherwise furnished, said quotations to any news distributing company or telegraph company, or any person or corporation, nor to any other place than that above designated, nor allow any person, or corporation whatsoever, to take directly or indirectly said quotations from said office. But nothing herein contained shall preclude us from furnishing said quotations to any branch office of ours, nor to any of our correspondents, provided that said branch office or offices shall first be approved by the New York Stock Exchange, and further provided that before furnishing said quotations to any such correspondent such correspondent shall be approved by the New York Stock Exchange, and we shall first obtain in duplicate (one of which shall be delivered to the New York Stock Exchange and one to you) an agreement signed by such correspondent in which said correspondent shall
63 agree with the United Telegram Company to abide by and comply with clauses 1, 2, 3, 4, and 7 hereof. If the undersigned shall furnish, or permit to be furnished, said quotations, or any of them, to any person, firm or corporation excepting after compliance with the provisions hereinbefore contained, the under-

signed hereby agrees that the United Telegram Company may sue the person, firm or corporation to whom said quotations or any of them are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making the undersigned a defendant thereto, provided the undersigned does not, or in case of a partnership all the members thereof do not, reside within the jurisdiction of the court in which said suit is brought.

(3) That the office or place above designated shall not be connected by any private telegraph or telephone wire, or other wire connection, or other means of communication with the office or place of business of any person or persons, or corporation, engaged in the business of making contracts, agreements, trades or transactions respecting the purchase and sale of stocks, bonds or other securities or commodities, or with any place where such business is conducted, unless the New York Stock Exchange shall have been notified of such connection and shall not have disapproved the same; nor with any branch office or correspondent excepting such branch offices and correspondents as have been approved in Clause 2 hereof. But nothing in this clause contained shall be construed as applying to the private wire connections of members of the New York Stock Exchange which have been approved in conformity with its rules.

(4) That at any and all times any person or persons designated by the said United Telegram Company or the said New York Stock Exchange shall have access to the office or place above designated, and the right to observe the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service in said office or place.

(5) That the United Telegram Company may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them, by the undersigned, or whenever directed so to do by the said New York Stock Exchange.

(6) That the United Telegram Company shall not be pecuniarily liable for the accuracy of the quotations which it may furnish under this application, nor for any delays, inaccuracies,
84 errors or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

(7) That quotations upon any stock, bond or other security at intervals of fifteen (15) minutes or less shall be deemed to be continuous quotations within the meaning of this application.

Accepted:

THE UNITED TELEGRAM COMPANY,
By —— ——.

Applicant approved:

NEW YORK STOCK EXCHANGE,
By —— ——."

One of said applications, when signed, shall be delivered to the Exchange; but said application and the acceptance thereof by the

Telegram Company shall not be effectual for any purpose until the subscriber is approved by the Exchange. Notice shall be promptly given by the Exchange of its approval or disapproval of the applicant.

It is understood and agreed, however, that the Telegram Company may furnish any quotations furnished to it hereunder to its patrons at intervals of more than fifteen (15) minutes without requiring such patrons to sign said application form; but the Telegram Company shall furnish to the Exchange a list of such patrons monthly, and shall discontinue such service to any thereof to whom the Exchange may object.

Fifth. The Telegram Company shall as soon as practicable furnish to the Exchange a list of all persons to whom it is furnishing continuous quotations of the Exchange under subsisting contracts at the time of the execution hereof, with the full name, addresses and business occupations of said persons, and shall at reasonable intervals of time, when requested so to do by the Exchange, furnish the Exchange with a complete list of persons to whom it is then furnishing said continuous quotations, together with similar information in respect to them.

Sixth. The Telegram Company agrees that it will use its best efforts to prevent any persons, other than those approved by the
65 Exchange as hereinbefore provided from obtaining said quotations; and that in case said quotations are obtained by persons not so approved, it will use its best endeavors to ascertain the source from which the same are obtained, and to inform the Exchange fully in respect thereto. The Telegram Company further agrees that in case any person shall fail to comply with any of the conditions, restrictions and limitations contained in the application signed by him as hereinbefore provided, it will at its own risk, cost and expense terminate the contract between him and it and the furnishing of said quotations to him thereunder.

In case any suit or legal proceeding is brought to enjoin the Telegram Company from refusing to furnish quotations to any person, the Telegram Company shall at once inform the Exchange of such suit or proceeding, and shall permit the Exchange to intervene therein, or to defend the same in the name of the Telegram Company, but, in such cases, the Exchange shall indemnify the Telegram Company against and save it harmless from any and all costs and damages awarded against it.

In case the Exchange institutes any suit or proceeding to enjoin any person not entitled to said quotations from obtaining or using the same, the Telegram Company will cooperate with and assist the Exchange in its prosecution; and whenever requested so to do by the Exchange, and indemnified against any cost or liability which it may thereby incur, it will institute in its name or permit the Exchange to institute in the name of the Telegram Company, any action or proceeding to prevent any persons not entitled to said quotations from obtaining or using the same. The Telegram Company shall, unless enjoined by any court from doing so, discontinue furnishing

said quotations to any person whether a member or non-member of the Exchange whenever notified by the Exchange of its disapproval of such person, but in all cases of discontinuance, pursuant to notice given by the Exchange, the Exchange shall indemnify and save harmless the Telegram Company from all costs, damages, or liabilities which it may incur by reason of such discontinuance.

Seventh. The charge made by the Telegram Company for furnishing said quotations to members of the Exchange shall not in any case exceed the charge for such service made to any nonmember of the Exchange similarly located.

Eighth. The Telegram Company agrees to pay to the Exchange at the rate of nine thousand ($9,000) dollars per annum during
66 the continuance of this agreement in equal monthly installments, that is to say, seven hundred and fifty ($750.00) Dollars on the last day of each month.

Ninth. The parties hereto agree that if at any time hereafter any difference or dispute shall arise between them concerning the true intent, meaning or construction or anything contained in this contract, or concerning any matter included within the spirit or scope thereof, or concerning the acts or omissions of the Exchange or the Telegram Company in connection with the performance thereof, then, so often as a dispute or difference shall arise, any and all such matters in difference shall be submitted and referred to the award and determination of three arbitrators to be chosen one by the Exchange, another by the Telegram Company, and a third by the two thus chosen; and the decision or award of any two of the arbitrators in writing shall be binding upon, and final between the Exchange and the Telegram Company, and shall be carried out and performed by the said Exchange or the Telegram Company, as the case may be.

Tenth. It is understood and agreed that as to the right of the Exchange, hereinbefore specified, to disapprove applicants for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations.

Eleventh. This agreement shall take effect on the first day of October, 1914, and shall continue in force until and including the 30th day of June, 1915; and shall continue in force thereafter until the expiration of thirty days after written notice shall have been given by either party to the other terminating the same.

Twelfth. Wherever the word "person" or "persons" or "non-member" or "non-members" is used herein it shall be deemed to include firms, corporations and associations as well as natural persons. The term "member of the Exchange" shall be construed to include any firm, one or more of whose members are members of the Exchange.

Wherever, by the terms hereof, any action, approval of disapproval of the Exchange is authorized or required, the written statement of the Secretary or Assistant Secretary of the Exchange with respect thereto, shall be sufficient evidence thereof.

In Witness Whereof, the Telegram Company has caused these

presents to be executed by its President, and its corporate seal
67 to be hereto affixed, and the Stock Exchange has caused the same to be executed by its President and Secretary, the day and year first above written.

THE UNITED TELEGRAM COMPANY,
By CHARLES F. PARKER, *President.*

[NOTARY SEAL.]
ADOLPHUS B. BEEDING,
*Notary Public.*

Attest:—
—— ——, *Secretary.*

NEW YORK STOCK EXCHANGE,
By H. G. S. NOBLE, *President.*

Attest:—
GEORGE W. ELY, *Secretary.*

EXHIBIT B.

NEW YORK, April 16, 1915.

Charles F. Parker, Esq., President, United Telegram Company, Boston.

DEAR SIR: I beg to inform you that the Committee on Quotations has disapproved application of Mr. Calvin H. Foster of Boston.

Mr. Foster appeared before the Committee on Quotations, on Wednesday, January 20, 1915, and made a statement extracts from which are sent you herewith.

Yours truly,

GEORGE W. ELY, *Secretary.*

NEW YORK, April 16, 1915.

[*Extracts from Testimony of Calvin H. Foster.*]

The Chairman: Now, Mr. Foster you have mentioned three concerns—The Metropolitan Stock Exchange, the Tremont Exchange and the Boston Stock & Grain Exchange—that you have been connected with.

68 Mr. Foster: Yes, sir.

The Chairman: Were all three of these concerns bucket-shops?

Mr. Foster: Well, I think very likely they were considered such, but I am not sure. Well, the Metropolitan was, I think, considered a bucket-shop.

The Chairman: Now, let us get down to business. You have pre-

sented a record which shows a long connection, in one way or another, with bucket-shops?

Mr. Foster: Yes, sir.

The Chairman: That is exactly what this Committee is trying to prevent.

Mr. Foster: Well, I haven't done anything of the kind since 1907, and I don't want to do anything of the kind, and have no intention of doing anything of the kind. I never would allow an order executed in my office for a customer under any circumstances whatever. I always went to the people that I did business with, and I think my record is clear in connection with doing business that way since 1907, when the Massachusetts Anti-Bucket shop law was passed.

The Chairman: You still want the record to appear that you have never had any connection with the Federal Stock & Grain Co.?

Mr. Foster: Yes, sir. I most emphatically do, because I have been very careful to look that up myself, and I have looked up all the records and I am just as sure as I can be, as anything can be, that I never had anything whatever to do with that company.

The Chairman: But the facts are that you were doing business through the Metropolitan, The Tremont and the Boston Stock & Grain Exchange, and with the Cella Commission Co. and N. J. Sage & Co., at one time or another?

Mr. Foster: Yes, sir.

[Seal of the Public Service Commission.]

A true copy of answer of the United Telegram Company and Gold and Stock Telegraph Company in the matter of the complaint of Calvin H. Foster.

Attest:

ANDREW A. HIGHLANDS, *Secretary.*

69 *Answer of Calvin H. Foster.*

This respondent admits the allegations in paragraph 1 of the petitioners' petition; this respondent admits the allegations in paragraph 2; this respondent admits the allegations in paragraph 3; this respondent admits the allegations in paragraph 4; this respondent admits the allegations in paragraph 5; this respondent admits the allegations in paragraph 6; this respondent admits the allegations in paragraph 7; this respondent admits the allegations in paragraph 8; this respondent admits the allegations in paragraph 9; this respondent denies all the allegations in the tenth paragraph of the petitioners' petition so far as the same are alleged to be allegations of fact. This respondent denies that the order of the Public Service Commission is illegal or unlawful in any way, but that the said order is based upon the fundamental principles of law, and in strict accordance with the rules of law and justice.

CALVIN H. FOSTER,
By His Attorney, P. H. KELLEY.

Filed October 9, 1915.

8—680-1

*Answer of Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, and John F. Meaney, Members of the Public Service Commission of the Commonwealth of Massachusetts.*

And now come the respondents, and answering say:

1. They admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the petition.

2. They deny each and every allegation in the tenth paragraph of the petition contained.

By Their Attorney, HENRY C. ATTWILL,
*Attorney General.*
By H. WARE BARNUM,
*Assistant Attorney General.*

Filed October 26, 1915.

70 No. 24561.

FREDERICK J. MACLEOD, EVERETT E. STONE, JOSEPH B. EASTMAN, John F. Meaney, and Charles A. Russell, Constituting the Public Service Commission of the Commonwealth of Massachusetts, Complainants,

v.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation Organized under the Laws of the State of New York, and The United Telegram Company, a Corporation Organized under the Laws of the State of New Jersey, both of said Corporations Having Their Usual Places of Business in Boston, Respondents.

*Bill of Complaint.*

1. Now come your complainants, Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, and allege that this bill of complaint is brought by them in their official capacity as members of the Public Service Commission of the commonwealth of Massachusetts.

2. And your complainants allege that the Western Union Telegraph Company is a corporation organized under the laws of the state of New York, and has a usual place of business in Boston in the commonwealth of Massachusetts; and your complainants allege that the United Telegram Company is a corporation organized under the laws of the state of New Jersey and has a usual place of business in Boston in said commonwealth.

3. Your complainants further allege that both of the said respondent corporations are public-service corporations doing business in the commonwealth of Massachusetts as foreign corporations engaged in the business of transmitting intelligence, within the commonwealth, by electricity and by means of telephone and telegraph lines and other methods and systems of communication, including the operation of all conveniences, appliances, instrumentalities, and

equipments utilized in connection therewith and appertaining thereto.

4. Your complainants further allege that one Calvin H. Foster of Boston, Mass., a stock broker having his usual place of business in said Boston, made an application to your complainants in their official capacity as the Public Service Commission of Massachusetts, in which application the said Foster requested your complainants to order the said respondent telegraph companies to furnish him with certain service, which the said respondent companies had
71 refused to furnish to the said Foster previous to the application by the said Foster to your complainants as aforesaid.

5. Your complainants further allege that the said respondent telegraph companies were thereafter ordered by your complainants to appear and show cause why they should not furnish the service requested and required of them by the said Foster; and that thereafter the said respondent telegraph companies, after notice from your complainants as aforesaid, did appear by their respective counsel before your complainants, and did file their answers in the said proceeding by the said Foster, denying the right of the said Foster to the service requested by him.

6. Your complainants, acting in their official capacity as the Public Service Commission of the commonwealth of Massachusetts, set the said cause and issue then pending between the said Foster and the said respondent telegraph companies as aforesaid down for a hearing upon the merits, and both the said Foster and the said respondent telegraph companies, by their respective counsel, did appear at the said hearing on the merits, and were each of them fully heard; and after such hearing on the merits your complainants did take the matter at issue under advisement, said hearing on the merits having been had before your complainants in April, 1915.

7. Your complainants further allege that after due deliberation, and in accordance with the judgment and discretion vested in them under the provisions of chapter 784 of the Acts of 1913, your complainants, on September 7, 1915, did order the said respondent telegraph companies to furnish the said service requested and required of them in the application of said Foster. A copy of the said order is hereto annexed, and marked "Exhibit A."

8. And your complainants allege that said order, issued by your complainants as aforesaid, was served upon the said respondent telegraph companies on or about the 7th day of September, 1915; and your complainants allege that, since the said order was served on the said respondents as aforesaid, the said respondents have neglected, failed, and refused to comply with the terms of the said order.

9. And your complainants allege that under the provisions of chapter 784 of the Acts of 1913 it is the duty of the said respondent telegraph companies to obey the aforesaid order above referred to until such time as such order may be modified or annulled, or the enforcement thereof stayed, by the Supreme Judicial Court, as provided for in said chapter 784 of the Acts of 1913.

Wherefore your complainants pray:

(1) That, pending the final decision herein, an inter-
72 locutory decree be entered enjoining the said Western Union Telegraph Company and the said United Telegram Company to furnish the said Calvin H. Foster, upon his making due payment therefor, the continuous quotations of the New York Stock Exchange, by means of ticker service, now furnished and supplied to others.

(2) That a final decree be entered to the same effect.

(3) That the respondents be ordered by mandatory injunction to comply with the aforesaid order of the Public Service Commission.

(4) For such other and further relief as to this Honorable Court shall seem meet and just.

FREDERICK J. MACLEOD,
EVERETT E. STONE,
JOSEPH B. EASTMAN,
JOHN F. MEANEY,
CHARLES A. RUSSELL,
*Constituting the Public Service Commission of Massachusetts.*
By HENRY C. ATTWILL,
*Attorney General.*

I, Frederick J. Macleod, one of the petitioners in the above-entitled case, hereby certify that I have read the foregoing petition, and that the statements therein contained are true to the best of my knowledge and belief.

FREDERICK J. MACLEOD.

COMMONWEALTH OF MASSACHUSETTS,
*County of Suffolk, ss:*

BOSTON, October 15, 1915.

Personally appeared the above-named Frederick J. Macleod, and made oath that the foregoing statement, by him subscribed, is true.

Before me,

JOHN W. CORCORAN,
*Justice of the Peace.*

Filed October 15, 1915.

EXHIBIT A.

*Order.*

It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company have without just cause denied and refused to
73 supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

Ordered, That the Gold and Stock Tealgraph Company, by The

Western Union Telegraph Company, lessee, and The United Telegram Company shall forthwith remove said discrimination.

*Answer of the Respondents, The Western Union Telegraph Company and The United Telegram Company.*

And now come these respondents, and for answer admit:

1. The allegations set forth in the first, second, third, fourth, fifth, and sixth paragraphs of the complainants' bill of complaint.

2. And your respondents admit the allegation in the seventh paragraph of the complainants' bill of complaint—that after due deliberation the Public Service Commission made the order, a copy of which order is annexed to said bill of complaint and marked "Exhibit A"—but deny that said order was in accordance with the judgment and discretion vested in the Public Service Commission under the provisions of chapter 784 of the Acts of 1913; and further deny that said order required the respondents to furnish the said service requested and required of them in the application of said Calvin H. Foster.

3. And your respondents admit the allegations in the eighth paragraph of the complainants' bill of complaint.

4. And your respondents deny the allegation in the ninth paragraph of the complaint—that under the provisions of chapter 784 of the acts of 1913 it is the duty of the said respondent telegraph companies to obey the aforesaid order above referred to until such time as such order may be modified or annulled, or the enforcement thereof stayed by the Supreme Judicial Court, as provided for in said chapter 784 of the Acts of 1913—for the reason that said order was unlawful and invalid.

5. And your respondents further allege that subsequent to the date of said order, to wit, on the 7th day of September, 1915, they filed in the Supreme Judicial Court their petition under the statute of 1913, c. 784, sec. 27, entitled, "Western Union Telegraph Company, and United Telegram Company, Petitioners, vs. Calvin H. Foster and Frederick J. McLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, Members of the Public Service Com-
74 mission, Respondents," a copy of which is hereto annexed marked "Exhibit A," which petition is still pending in the Supreme Judicial Court; and that until the questions raised by said petition, affecting the lawfulness and validity of said order, are determined, no interlocutory or final decree enforcing said order, as prayed for in said complainants' petition, should be made.

6. And your respondents further allege that said order of the Public Service Commission was, and is, unlawful and invalid for the following reasons:

(*a*) That said Public Service Commission is without jurisdiction over the subject-matter of the complaint and had no jurisdiction to enter the order complained of.

(*b*) That the Public Service Commission is without jurisdiction

over the subject-matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress, and said Public Service Commission therefore had no jurisdiction to enter the order complained of.

(*c*) That upon the facts stated in the answer of said Western Union Telegraph Company and said United Telegram Company, and in said report of the Public Service Commission, neither said Western Union Telegraph Company nor said United Telegram Company has the legal right to render the services demanded by the complainant and now required by said order complained of, in view of their contracts with said New York Stock Exchange, set forth in their said answers.

(*d*) Because the said order is based on an erroneous ruling by said Public Service Commission that said petitioners have unlawfully and unjustly discriminated against said Calvin H. Foster, when, as matter of law, upon the facts found by said Commission in their report, said discrimination was neither unlawful nor unjust.

(*e*) That your complainants, the Western Telegraph Company and the United Telegram Company, would be required, in order to comply with such order, to appropriate the property of said New York Stock Exchange for the benefit of the said Foster, and thereby destroy their valuable contracts with said Exchange, contrary to the provisions of the federal Constitution, in that your petitioners would thereby be deprived of their property without due process of law.

WESTERN UNION TELEGRAPH COMPANY AND
UNITED TELEGRAM COMPANY,
By Their Attorney, ARTHUR LORD.

Filed October 23, 1915.

75 [Memo. Exhibit A, to which reference is made in the preceding answer of the Western Union Telegraph Company and United Telegram Company, is not here printed, as it is a copy of the petition of the Western Union Telegraph Company and United Telegram Company, with the exhibits attached thereto, in the equity case No. 24511, and printed in the preceding pages of this record.]

Copy.
Attest:
JOHN F. CRONIN, *Clerk.*

[Endorsed:] No. —. Eq. Western Union Telegraph Co. et al. v. Calvin H. Foster et al. Frederick J. Macleod et al. v. Western Union Telegraph Co. et al. Reservation, &c. Suffolk County.

76 And afterwards, to wit, on the nineteenth day of June, A. D. Nineteen hundred and sixteen it was ordered by our said Supreme Judicial Court for the Commonwealth, as follows, viz:

77 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

At BOSTON, June 19, 1916.

In the case of Western Union Telegraph Company et al. vs. Calvin H. Foster et al., pending in the Supreme Judicial Court *Court* for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz., Petition dismissed with costs.

By the Court,

C. H. COOPER, *Clerk.*

June 19, 1916.
Over.

Brief Statement of the Grounds and Reasons of the Decision.

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

[Endorsed:] No. 24511 Eq. Supreme Judicial Court for the Commonwealth. Rescript, Suffolk County. Western Union Telegraph Co. et al vs. Calvin H. Foster et al.

78 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

At BOSTON, June 19, 1916.

In the case of Frederick J. Macleod et al. vs. Western Union Telegraph Company et al., pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz., Decree to be entered enjoin-g the defendants to comply with the order of the Public Service Commission.

By the Court,

C. H. COOPER, *Clerk.*

June 19, 1916.
Over.

[Endorsed:] 24561 Eq. No. 939. Supreme Judicial Court for the Commonwealth. Rescript, Suffolk County. Frederick J. Macleod et al. vs. Western Union Telegraph Co. et al. Suffolk ss: Supreme Judicial Court. Filed Jun- 21, 1916. John F. Cronin, Clerk.

79 And said rescripts were entered by our said Court, accordingly.

Whereupon the parties appeared, and further hearing being had upon the Rescripts the following Final Decrees were entered by our said Court, viz:

80 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Supreme Judicial Court.

No. —. In Equity.

WESTERN UNION TELEGRAPH COMPANY and UNITED TELEGRAM COMPANY
v.
CALVIN H. FOSTER and FREDERICK J. MACLEOD, EVERETT E. STONE, Joseph B. Eastman and John F. Meaney, Members of the Public Service Commission.

*Final Decree.*

This cause came on to be heard after rescript from the full bench, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed that the petition herein be, and the same hereby is, dismissed.

It is Further Ordered, Adjudged and Decreed that the respondent Calvin H. Foster and the respondents Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman and John F. Meaney, members of the Public Service Commission, jointly recover their costs, taxed in the sum of Seventy-three 91/100 dollars, and that execution in common form issue therefor.

By the Court,

JOHN F. CRONIN, *Clerk.*

June 30, 1916.

[Endorsed:] No. 24511 Eq. Western Union Telegraph Co. and United Telegram Co. v. Calvin H. Foster and Frederick J. Macleod et als. Final Decree. (Carroll, J.) June 30, 1916.

81 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Supreme Judicial Court.

No. 24561. In Equity.

FREDERICK J. MACLEOD et al.
v.
THE WESTERN UNION TELEGRAPH COMPANY and THE UNITED TELEGRAM COMPANY.

*Final Decree.*

This case came on to be heard after rescript from the full bench, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed that the respondents, The Western Union Telegraph Compnay and The United Telegram Company, be commanded and enjoined forthwith to comply with the following order of the Public Service Commission:

Order of Public Service Commission.

It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company have without just cause denied and refused to supply *the* Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

Ordered, that the Gold and Stock Telegraph Company, by
82 the Western Union Telegraph Company, lessee, and The United Telegram Company shall forthwith remove said discrimination.

By the Court,

JOHN F. CRONIN, *Clerk.*

June 30, 1916.

[Endorsed:] No. 24561. Frederick J. Macleod et al. v. Western Union Telegraph Co. and The United Telegram Co. Final Decree. (Carroll, J.) (June 30, 1916.)

83 All and singular which premises we have held good, by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the Seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County, on this twenty-sixth day of August in the year of our Lord One thousand nine hundred and sixteen.

[SEAL.] JOHN F. CRONIN, *Clerk.*

84 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, August 10, 1916.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Western Union Tel. Co. & United Tel. Co. v. Calvin H. Foster et al., Public Service Commsrs. v. Western Union Tel. Co. & United Tel. Co. decided on the 19th day of June, 1916.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

RUGG, *C. J.*

These cases arise under St. 1913, c. 784. In substance the petition by the Western Telegraph Company and the United Telegram Company seeks a review and annulment of an order of the public

service commission, while the public service commission by its petition seeks enforcement of such order. These orders are designed to prevent unfair and unjust discrimination by the telegraph companies. The statute confers upon the public service commission ample powers to that end. It also clothes the Supreme Judicial Court with jurisdiction to review, modify, or amend unlawful rulings and orders of the commissioners and to enforce its valid orders. s.s. 2, 20, 27, 28.

The material facts are that the telegraph companies are furnishing to brokers and others in Boston continuous ticker quotations of transactions upon the New York Stock Exchange, which they are enabled to do by means of contracts between the telegraph
85 companies and the New York Stock Exchange. The stock exchange is a voluntary association with its place of business in New York. Quotations of sales of stock on the New York Stock Exchange are collected by employees of the exchange, and, for a substantial consideration, furnished to each of the telegraph companies in New York under contracts which permit them to "furnish said quotations or any part thereof, or any information therein contained, to its patrons by means of tickers, or by telegraph or telephone wires or instruments * * * subject to the limitations, conditions and provisions hereinafter contained," one of which is that such quotations shall not be furnished "to any subscriber thereof unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company and the subscriber shall have been approved by the Exchange," the intent of which is declared to be "only to prevent the unlawful or improper use of such quotations." The quotations are collected and delivered almost moment by moment as the sales occur during business hours on the stock exchange. The quotations as thus received in New York are transmitted as soon as may be by each of the telegraph companies to its Boston office. Each of the telegraph companies has a main office in Boston, where there are electrical appliances connected by a system of cables and wires under and across public ways with ticker instruments in the offices of its patrons. The quotations received from New York are delivered into the main Boston office in the Morse code over ordinary telegraph wires. Forth-
86 with an employee operating a keyboard causes them to be written simultaneously by means of ticker instruments upon a tape of paper in the office of each patron, where they can easily be read. The result is that the quotations are reported on the ticker as the sales are made and within a brief time thereafter.

Foster applied to each company for this ticker service upon application forms prescribed by the contracts between the stock exchange and the telegraph companies, which were transmitted by each company to the stock exchange for its approval. The stock exchange did not approve the applications and the telegraph companies refused to install the ticker service. Foster thereupon applied to the public service commission to be furnished with the service. He alleged in his petition that he had been engaged for a long time in the stock brokerage business in Boston, had previously been fur-

nished with tickers, which were removed in 1914; that he had applied for a renewal of the service, had appeared before the appropriate committee of the New York Stock Exchange on two different occasions where he had submitted himself to examination and answered all questions asked; that in conducting his business he always has complied with the laws of this Commonwealth, and does not desire the quotations and ticker service for any unlawful or improper purpose, but for use in his legitimate brokerage business, which will suffer irreparable injury if he is unable to procure it. These allegations were not denied before the commission and cannot be challenged seriously here. The commission found that the petitioner was ready and willing to pay the price charged to
87 other patrons of the telegraph companies for ticker service, and to comply with all reasonable rules and regulations, and that the telegraph companies simply had been notified that the exchange had disapproved the petitioner's applications, without stating any reason. The commission found that there was no evidence that the petitioner desired the quotations for unlawful or improper use, and that the telegraph companies were guilty of unjust and illegal discrimination in that, without just cause, they denied and refused to supply to Foster the quotations of the stock exchange by means of ticker service, and ordered the companies forthwith to remove such discrimination. The cases must proceed upon the footing that these findings of fact are true.

The quotations, when collected and tabulated by the exchange constitute its private property. As such they are entitled to every protection afforded by law to any other private property. Like other property they may be kept by their owners to themselves, or sold or distributed to others, or made known to some and denied to others. Their communication to many different persons under contracts does not make them public and is not such a publication as destroys their character as property. Strangers may be restrained from wrongfully obtaining possession of the information, and wrongdoers will be prevented from intermeddling with it. These propositions are not now open to question. F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62.

The stock exchange has not undertaken to distribute this information itself. It does not deal immediately with those who
88 receive it by means of the ticker service. It has no contractual relation direct or indirect with the users of ticker service. It does not send the quotations to such users. Under its contract it "agrees at its own expense to furnish to the Telegraph Company" the quotations. The telegraph company in turn is authorized to "furnish said quotations, or any part thereof, or any information therein contained, to its patrons by means of tickers," or otherwise. One significant feature of this arrangement is that it is made with a common carrier of intelligence, whose facilities for practically instantaneous transmission of the stock quotations throughout the country are of the best. Manifestly the use of the information most advantageous to the stock exchange is dependent upon its swiftly coming to the knowledge of those likely to be cus-

tomers of its members. It seems obvious that the reason for making such contracts with telegraph companies is founded chiefly on their facilities for immediate transmission of the quotations to different parts of the country, facilities possessed by these companies solely because they are performing a quasi public function as common carriers. The persons to whom quotations may be furnished are described in the contract between the stock exchange and each of the telegraph companies as "patrons" of the telegraph company. That is the exactly correct word to describe the relation contemplated by the contract between the telegraph company and the user of the ticker. The user of the ticker is a customer of the telegraph
89 company. He is not the recipient of messages from the stock exchange nor its customer nor contractee. That is plain from the frame of the contract. The transaction constitutes in effect a kind of sale of the quotations from the stock exchange to the telegraph company. The Stock Exchange does not use the telegraph company as a means for selling its property to others. It makes a sale directly to the telegraph company. The stock exchange receives annually from the telegraph company a large sum of money for the delivery of the information. The sender of ordinary messages is not paid by the telegraph company for sending them. To treat that annual payment as on account of sending messages would constitute a gross preference of the stock exchange over the rest of the public sending telegraphic messages. Such an intent cannot be presumed. The amount of the payment to the stock exchange, so far as disclosed by the contract, bears no direct relation to the amount which the telegraph company may receive from its ticker service. Plainly it is not the ordinary case of one person sending messages to another by the telegraph for a tariff charge. In this connection the telegraph company is not acting wholly as a common carrier in the conventional sense. It is conducting the business of distributing information on its own account through facilities acquired and held by it because it is a common carrier, not for a fixed transportation charge, but for its own profit. Having paid a gross sum for the information, it proceeds to make whatever money it rightly may by disseminating that information at
90 its own expense and through its own instrumentalities, to such customers as it may secure. It has the right to subdivide the quotations and rearrange them, and to deliver them in whole or in part or in such combination as it chooses. That is one of the express terms of its contract. The affair becomes its venture and not primarily or in this aspect at all the venture of the stock exchange. The only limitations professed to be expressed by the contract upon the absolute right of the telegraph company to deal with the quotations as its own are those tending to prevent the destruction of their value by being taken surreptitiously or otherwise, none of which are here in question, and that no one shall be furnished a ticker without approval of the stock exchange, for the single purpose of preventing the illegal use of the information. It cannot be contended on this record that that is the real ground of the refusal by the stock exchange to approve the application of

Foster. No evidence of consequence was offered before the commission on this ground. The privilege conferred upon the telegraph company and the rights acquired by it under the contract are not solely those of a common carrier or the ordinary transmitter of intelligence. They savor of those of a proprietor dealing with his own. It does not seem necessary to analyze more accurately the kind of transaction entered into between the stock exchange and the telegraph company. The latter acquired a kind of right in the quotations which has some of the incidents of property. Illinois Commission Co. v. Cleveland Telegraph Co. 56 C. C. A. 205.
91 When the stock exchange parted with that right to such a person as a telegraph company, it subjected that right to the necessary characteristics and limitations which inevitably attach to rights belonging to such an owner. Whatever may be said as to the right of a quasi public corporation to acquire purely private property has no application to the facts here disclosed. The property acquired by the telegraph companies in the stock quotations has no value to them except as they use their public franchises, granted and exercised solely because of the public service they are organized to render, in sending these quotations to financial centres for distribution by sale to their patrons. They are able to secure patrons in the case at bar solely through the exercise of their public functions in and under the streets of Boston. Such property destined to such use as are the quotations is as subject to public regulation in its use as are its other public functions. The property right is merely incidental to the public service function.

Telegraph companies exercise a public employment and are bound to serve all the public without discrimination. They may impose proper rules to which their patrons must conform, but these regulations must apply alike to all. They are a kind of common carrier. Primrose v. Western Union Telegraph Co. 154 U. S. 1. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1. Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92. Marconi Wireless Telegraph Co. v. Com., 218 Mass. 558,
92 568. Cumberland Telephone & Telegraph Co. v. Kelly, 87 C. C. A. 268. They are subject to regulation under legislative authority on the ground that they are impressed with a public character. They are enabled to use public ways in Boston for wires and conduits and under ground cables and thus carry on their business, including the ticker service, only because they carry on business of a public character which is to be exercised under public control. Pierce v. Drew, 136 Mass. 75. New England Telephone & Telegraph Co. v. Boston Terminal Co. 182 Mass. 397, 399. See Attorney General v. Haverhill Gas Light Co. 215 Mass. 394. When such corporations have acquired rights in the disposal of which the public are interested, they must deal with those rights in accordance with the requirements of public regulations. The rights which these telegraph companies have acquired in connection with the quotations are beyond those merely incident to the transmission of intelligence from one person to another. They involve the distribution and dissemination of information as to which it has assumed

far greater duties than those of simple transmission, and as to which its facilities growing out of its public character must be used. In this respect the case at bar is strictly analogous to those where patentees of telephones have undertaken to lease instruments subject to a limitation inconsistent with the public duties of the lessee, or which disable the lessee from performing its full obligation to the public. Many such cases have arisen and it generally has been held that such limitations have been repugnant to the general purpose of the lease of telephones, which is to serve the public without dis-
93 crimination or favor. State v. Bell Telephone Co. 23 Fed. Rep. 539. State v. Delaware & American Telephone & Telegraph Co. 2 C. C. A. 1. State v. Telephone Co. 36 Ohio St. 296. Commercial Union Telephone Co. v. New England Telephone & Telegraph Co. 61 Vt. 241. Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telephone Co. 66 Md. 399, 416. See Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 25 C. C. A. 267, 272; Bement v. National Harrow Co. 186 U. S. 70, 91; Union Trust & Savings Co. v. Kimlock Long Distance Telephone Co. 258 Ill. 202. See to the contrary, American Rapid Telegraph Co. v. Connecticut Telephone Co. 49 Conn. 352. It is a necessary consequence that the property or quasi property rights acquired by the telegraph companies in the quotations under their contracts with the stock exchange are subject to regulation by public boards to the extend authorized by St. 1913, c. 784, and exercised by the order of the public service commission here under review.

It follows that the condition in the contracts between the telegraph companies and the stock exchange, whereby the attempt is made to limit the persons, among law abiding citizens, to whom the quotations may be delivered, cannot stand against regulation by a public authority to insure indiscriminate distribution.

There is nothing inconsistent with this conclusion in Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, Hunt v. New York Cotton Exchange, 205 U. S. 322, and Board of Trade of Chicago v. Cella Commission Co. 76 C. C. A. 28. Those decisions
94 protect the owners of quotations against theft. They involve no principle touching the regulation of service rendered by a telegraph company respecting information as to which it has assumed obligations and acquired rights such as those here disclosed.

There are numerous decisions, some by courts not of last resort, upon questions more or less similar to the one here presented. The result here reached is supported by the principle followed in Smith v. Gold & Stock Telegraph Co. 42 Hun., 454, Friedman v. Gold & Stock Telegraph Co. 32 Hun., 4 Shepard v. Gold & Stock Telegraph Co. 38 Hun., 338, Western Union Telegraph Co. v. State, 165 Ind. 492, 500, 501, New York & Chicago Grain & Stock Exchange v. Board of Trade. 127 Ill. 153, and Tucker v. Western Union Telegraph Co. decided by the Supreme Court of Erie County, New York, in June, 1915, affirmed by Appellate Division in December, 1915, 156 N. Y. Supp. 1148, and is contrary to Matter of Renville, 46 App. Div. 37, Sterrett v. Telegraph Co. 18 Weekly Notes of Cases

(Penn.) 77, and perhaps to Griffin & Co. v. Western Union Telegraph Co. 8 Ohio Decisions Reprint, 572, Cain v. Western Union Telegraph Co. 10 Ohio Decisions Reprint, 72.

The jurisdiction of the public service commission extends to telegraph companies by the express terms of St. 1913, c. 784, s. 2. The use of wires and conduits in and under the streets by the telegraph companies in the ticker service renders that kind of service subject to public regulation. It is the "transmission of intelligence within the Commonwealth by electricity," and "service" 95 connected therewith as the word "service" is used in s. s. 2, 10, 14, 17, 20, 22, 23 of the statute.

In this aspect of the case it is unimportant that the stock exchange is not a party to the proceedings. Whatever may be its interest in the subject matter, it is not a necessary party. These proceedings deal only with the rights acquired by the telegraph companies in the quotations. Cases like Lawrence v. Smith, 201 Mass. 44, and Gregory v. Stetson, 133 U. S. 579, 586, are not pertinent in this connection. The rights here in issue arise under an attempted legislative regulation of the conduct of a public service corporation, and hence cases like Express Cases, 117 U. S. 1, where that element was absent, are not apposite.

The contract between the stock exchange and the telegraph companies was made subsequent to the enactment of the statute.* Manifestly such a contract cannot be pleaded in bar to the valid exercise of the police power under that statute. Contracts, though enforceable when made, are not enforceable to override such an exercise of the police power. Louisville & Nasvhille Railroad v. Mottley, 219 U. S. 467, 480. New York Central & Hudson River Railroad v. Gray, 239 U. S. 583.

It seems to us to follow that the telegraph companies are not exonerated from complying with an otherwise lawful order of the public service commission by the terms of their several contracts with the stock exchange.

96 The transactions disclosed on this record as having been dealt with by the public service commission in our opinion did not constitute interstate commerce. The sending of the quotations from New York to Boston over wires in the ordinary course of telegraphy manifestly was interstate commerce. But, as has been pointed out, the telegraph companies as to their ticker service sent no messages from New York to the individual ticker subscriber. The quotations as messages were sent by the Morse Code from New York to the telegraph companies at their Boston Offices. The quotations there were transferred by their own employees to instruments of a different character. By the ticker service the information was delivered to their patrons in Boston. The telegraph companies, in making this transmutation from the Morse Code telegraphic message, by which the quotations came from New York to their Boston

---

[Footnote] *The contract in force when the order was passed was dated July 1, 1914. St. 1913, c. 784, went into effect on July 1 of that year. s. 30.

offices, to the plain English of the tape on the ticker service through their own instrumentalities and mechanical devices, and through their own servants in their Boston offices, were pursuing a course somewhat, although not precisely, analogous to breaking — bulk of merchandise received by interstate commerce, putting it into smaller packages and delivering it in retail trade. The interstate transmission ended when the quotations reached the Boston offices. The subsequent acts in delivering the information upon the tickers in the offices of its customers were new and independent transactions. It was in effect a sale at retail of the information which it had received by interstate commerce. In principle it is the same
97 as if the telegraph companies had caused to be set up in type the information after it was received at the Boston offices and sent by a printed sheet to each of their patrons. It accomplishes the same result through the mechanism of the ticker. No messages have been received in New York directed to their patrons, who are subscribers to the ticker service. The telegraph companies have secured their patrons by their own efforts, and for consideration paid directly by the patrons to the telegraph companies and wholly retained by the latter to its own uses, delivery is made of the quotations to the patrons. That transaction, so far as touches compensation, is entirely between their patrons and the telegraph companies. No one else has any connection with that matter. The stock exchange has no concern with it.

The immunities and characteristics which inhere in an original package are not applicable to such transactions and afford no protection against State regulation of retail sales or distribution of imports. Austin v. Tennessee, 179 U. S. 343. Mutual Film Corp. v. Ohio Industrial Commission, 236 U. S. 230, 240. The principle of sales in the original package of goods transported in interstate commerce is foreign to these facts. The nature of the business transacted by the telegraph companies is such that the information contained in the quotations has no value to hold and to keep. Its valuable quality is in practically instantaneous transmutation into articulate form and impartation to large numbers of purchasers. The power to regulate by the State does not depend at all upon the source from which the information is derived, but
98 upon the means adopted for its distribution and communication through wires and conduits in the public streets of a domestic municipality.

These transactions are different in their nature from continous transportation of merchandise in interstate commerce, notwithstanding change in bill of lading, interruption of transit, and the like, where the initial purpose to transport by interstate or foreign commerce and the movement of the merchandise in such transportation is not changed but continues unbroken from the beginning despite temporary suspension. Cases like Texas & New Orleans Railroad v. Sabine Tram Co. 227 U. S. 111, and Illinois Central Railroad v. Railroad Commission of Louisiana, 236 U. S. 157, 163, which illustrate that principle, are inapplicable to the facts in the case at bar.

It is not necessary to multiply citations to show the fulness and completeness of the control of Congress over interstate commerce. It is indisputable. Minnesota Rate Cases, 230 U. S. 352, 398 to 412. Houston, East & West Texas Railway v. United States, and Texas & Pacific Railway v. United States, 234 U. S. 342, 351, Kirmeyer v. Kansas, 236 U. S. 568. The binding authority of these and like decisions is implicitly recognized. They do not seem pertinent to the facts of this record. While no analogy between information and chattels can be perfect, the case at bar in principle is indistinguishable from a purchase of a quantity of like books by the telegraph companies in New York for a gross price for the lot, the transportation of these in interstate commerce to their
99 Boston offices, where the original packages are opened and single books sold there to individual customers, to whom they are delivered by messengers of the telegraph companies. The method of dealing with them after the interstate commerce is ended by delivery in bulk at the main offices, is no part of interstate commerce. In this respect the case is like the cabs of the railroad employed solely in the local transportation of passengers who have come in interstate travel, which are subject to local regulation and are not a part of interstate commerce. Pennsylvania Railroad v. Knight, 192 U. S. 21. The ticker service under the circumstances here disclosed is "subject to the law of the State." Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230, 241.

The federal interstate commerce act does not appear to us to apply to the transactions here in question. Act of June 18, 1910, 36 U. S. Sts. at Large, c. 309, s. 7, p. p. 539, 544. That act relates to the transmission of messages by telegraph in interstate commerce. So far as that act manifests a purpose to regulate the field over which Congress has paramount authority, the right of the State to exercise its police power in the same field ceases to exist, no matter whether the particular act of Congress covers it entirely or not. The police power of the State may be put forth as to a subject not prohibited to the States and within national jurisdiction only when by the silence of Congress the nation has left it open. But when Congress speaks, then it supersedes existing, and prevents future, legislation by the several States on that subject. Com-
100 monwealth v. Boston & Maine Railroad, 222 Mass. 206, 210. Atchison, Topeka & Santa Fe Railway v. Harold, 41 U. S. 206, 210. The act of Congress here in question does not cover the local delivery by the ticker service radiating from Boston offices, to patrons in that city of each of the telegraph companies, of information bought by the telegraph companies and received in interstate commerce, but delivered in intrastate commerce under the circumstances disclosed in the cases at bar. Therefore, cases like Northern Pacific Railway v. Washington, 222 U. S. 390, Erie Railroad v. New York, 233 U. S. 671, 681, Port Richmond Ferry v. Hudson County, 234 U. S. 317, 330, Southern Railway v. Railroad Commission of Indiana, 236 U. S. 439, 447, Charleston & Western Carolina Co. v. Varnville Furniture Co. 237 U. S. 597, Western Union Telegraph v. Bilisoly, 116 Va. 562, have no application.

Great stress has been laid in argument upon the danger of the use of quotations by bucket shops. It has been urged that the only effective way, in view of the elusive methods pursued by those violators of the law, of preventing such abuse, is for the stock exchange to have and exercise the power absolutely and without review to approve or to disapprove the applicants for ticker service. The evils arising from that form of gambling need not be minimized. But the accomplishment of a laudable result does not justify the use of means condemned by a public board acting in accordance with a legislative enactment. The present case, however, upon the express finding of the public service commission, goes upon the footing that Foster is not subject to imputation in respect of a bucket shop.

101 In the view which we take of the case it becomes unnecessary to discuss or decide whether the order may be sustained also as affecting interstate commerce only incidentally and not imposing a direct burden upon it within the principle declared in numerous cases. See, for example, Western Union Telegraph Co. v. James, 162 U. S. 650; Western Union Telegraph Co. v. Commercial Milling Co. 218 U. S. 406, 416, Vermilye v. Western Union Telegraph Co. 207 Mass. 401; Commonwealth v. Peoples Express Co. 201 Mass. 564, 578; Atlantic Coast Line Railroad v. Glenn, 239 U. S. 388; Illinois Central Railroad v. Mulberry Hill Coal Co. 238 U. S. 275; Pennsylvania Railroad v. Puritan Coal Co. 237 U. S. 121; Missouri, Kansas & Texas Railway v. Harris, 234 U. S. 412; Missouri Pacific Railway v. Larabee Flour Mills, 211 U. S. 612; St. Louis, Iron Mountain & Southern Railway v. Arkansas, 240 U. S. 518.

The petition of the telegraph companies is to be dismissed with costs. In the petition by the public service commissioners, a decree is to be entered enjoining the telegraph companies to comply with the order of the public service commission.

So ordered.

102 [Endorsed:] Western Union Tel. Co. & United Tel. Co. vs. Calvin H. Foster, et al. Certified Copy of the Opinion of the Supreme Judicial Court.

103 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk County.*

Supreme Judicial Court.

In Equity.

No. 24511.

WESTERN UNION TELEGRAPH COMPANY et al.
vs.
CALVIN FOSTER et als.

*Petitioner's Petition for Writ of Error.*

Your petitioners, the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, and

the United Telegram Company, a corporation organized under the laws of the State of New Jersey, show unto Your Honors that heretofore, to wit, on the thirtieth day of June, A. D. 1916, at Boston, in the County of Suffolk, in said Commonwealth of Massachusetts, upon a petition under the provisions of Statutes of 1913, Chapter 784, Section 27, in which the Western Union Telegraph Company and the United Telegram Company were Petitioners and Calvin H. Foster and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, were respondents, final judgment was rendered against your petitioners in the Supreme Judicial Court within and for the County of Suffolk, in said Commonwealth, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in said suit, as appears by the record of said Supreme Judicial Court hereto annexed, and made part of this Petition.

104 And your petitioners say that in the trial of said case they was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statue of, and authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the constitution, and of a treaty, and statute of, and commission held under, the United States, and the decision was against the title, right, privilege, and exemption, specially set up and claimed under such clause of the said constitution, treaty, statute and commission, and a manifest error hath happened to the great damage of your petitioners.

Wherefore, your petitioners pray that Writ of Error to the Supreme Court of the United States may issue in due form of law and they will ever pray, &c.

WESTERN — TELEGRAPH COMPANY.
UNITED TELEGRAM COMPANY,

By their Soci*l*itor and Counsel,

ARTHUR LORD.

August 8, 1916—Writ of error allowed upon the execution of a bond by the above named petitioners, as principals, and the American Surety Company of New York, as surety, in the sum of Five Hundred (500) Dollars, to act as a supersedeas, and stay of

105 execution, pending decision upon writ of error.

ARTHUR P. RUGG,
*Chief Justice Supreme Judicial Court of Massachusetts.*

[Endorsed:] Supreme Judicial Court, Suffolk County. In Equity. No. 24511. Western Union Telegraph Co., et al., vs. Calvin Foster, et als. Petitioners' Petition for Writ of Error. Suffolk, ss. Supreme Judicial Court. Filed Aug. 9, 1916. John F. Cronin, Clerk.

106 COMMONWEALTH OF MASSACHUSETTS:
*Suffolk, ss:*

Supreme Judicial Court.

No. 24511. In Equity.

WESTERN UNION TELEGRAPH COMPANY et al.
vs.
CALVIN FOSTER et als.

*Assignment of Errors.*

And now come the Western Union Telegraph Company and the United Telegram Company, plaintiffs in error, (the original petitioners) and with their petition for a writ of error make and file the following assignment of errors, and respectfully submit that in the final judgment and decree, and the proceedings had prior thereto, of the Supreme Judicial Court, within and for the County of Suffolk, in the Commonwealth of Massachusetts, in the above-entitled cause, there is a manifest error, in that said Court erroneously refused to rule as requested in the petition of said plaintiffs:

1. That the Public Service Commission is without jurisdiction over the subject matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress, and said Public Service Commission, therefore, had no jurisdiction to enter the order complained of.

2. In that said Court did erroneously rule and decide against the prayers of the plaintiffs in error that the Public Service Com-
107 mission had jurisdiction over the subject matter of the complaint set forth in said petition, and that the same was not within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress, and that said Public Service Commission, therefore, had jurisdiction to enter the order complained of.

3. In that said court erroneously refused to rule, as requested in the petition of said plaintiffs in error, that said plaintiffs, the Western Union Telegraph Company and the United Telegram Company, would be required, in order to comply with said order, to wit, the order of the Public Service Commission of Massachusetts, to appropriate the property of said New York Stock Exchange for the benefit of said Foster, and thereby destroy their valuable contracts with said Exchange, contrary to the provisions of the Federal Constitution, in that your petitioners would ther-by be deprived of their property without due process of law.

4. In that the said Court did erroneously rule and decide that your petitioners, the Western Union Telegraph Company and the United Telegram Company, would not be required, in order to comply with said order, to appropriate the property of said New York Stock Exchange, for the benefit of said Foster, contrary to the pro-

visions of the Federal Constitution, and that your petitioners would not thereby be deprived of their property by due process of law.

THE WESTERN UNION TELEGRAPH COMPANY,
108 THE UNITED TELEGRAM COMPANY,
*Plaintiffs in Error (Original Petitioners)*,
By ARTHUR LORD,
*Their Solicitor and Counsel.*

[Endorsed:] Supreme Judicial Court, Suffolk, ss. *Un* Equity. No. 24511. Western Union Telegraph Company et al. vs. Calvin Foster et als. Assignment of Errors. Suffolk, ss. Supreme Judicial Court. Filed Aug. 9, 1915. John F. Cronin, Clerk.

109 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk County:*

Supreme Judicial Court.

In Equity.

No. 24561.

FREDERICK J. MACLEOD et als.
vs.
WESTERN UNION TELEGRAPH COMPANY et al.

*Respondents' Petition for Writ of Error.*

Your petitioners, the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, and the United Telegram Company, a corporation organized under the laws of the State of New Jersey, show unto Your Honors that heretofore, to wit, on the thirtieth day of June, A. D. 1916, at Boston, in the County of Suffolk, in said Commonwealth of Massachusetts, upon a Bill of Complaint in which Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Publice Service Commission of the Commonwealth of Massachusetts, were complainants, and your petitioners were defendants, final judgment was rendered against your petitioners in the Supreme Judicial Court within and for the County of Suffolk, in said Commonwealth, being the highest court of law or equity of the said State in which a decision could be had in said suit, as appears
by the records of said Supreme Judicial Court hereto annexed,
110 and made a part of this Petition. And your petitioners say that in the trial of said case there was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of, and authority exercised under, said State, on the ground of their being

repugnant to the Constitution, treaties, and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution, and of a treaty, and statute of, and commission held under, the United States, and the decision was against the title, right, privilege, and exemption, specially set up and claimed under such clause of the said Constitution, treaty, statute and commission, and a manifest error hath happened to the great damage of your petitioners.

Wherefore, your petitioners pray that a Writ of Error to the Supreme Judicial Court of the United States may issue in due form of law, and they will ever pray, &c.

WESTERN UNION TELEGRAPH COMPANY,
UNITED TELEGRAM COMPANY,
By Their Solicitor and Counsel,
ARTHUR LORD.

August 8, 1916.—Writ of error allowed upon the execution of a bond by the above named petitioners, as principals, and the American Surety Company of New York, as surety, in the sum
111 of Five Hundred (500) Dollars, to act as a supersedeas, and stay of injunction, pending decision upon writ of error.

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

[Endorsed:] Supreme Judicial Court, Suffolk Co. In Equity. No. 24561. Frederick J. Macleod, et als. vs. Western Union Telegraph Co., et al. Respondents' Petition for Writ of Error. Massachusetts Supreme Judicial Court. Filed Aug. 9, 1915. John F. Cronin, Clerk.

112 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Supreme Judicial Court.

In Equity. No. 24561.

FREDERICK J. MACLEOD et al.
v.
THE WESTERN UNION TELEGRAPH COMPANY and THE UNITED TELEGRAM COMPANY.

*Assignment of Errors.*

And now come The Western Union Telegraph Company and the United Tele*graph* Company, plaintiffs in error, (the original respondents) and with their petition for a writ of error make and file the following assignment of errors, and respectfully submit that in the final judgment and decree, and the proceedings had prior thereto,

of the Supreme Judicial Court, within and for the County of Suffolk, in the Commonwealth of Massachusetts, in the above entitled cause, there is manifest error, in that said Court erroneously refused to rule as requested in the answer of said plaintiffs—

1. That the Public Service Commission is without jurisdiction over the subject matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress, and said Public Service Commission, therefore, had no jurisdiction to enter the order complained of.

2. In that said Court did erroneously rule and decide
113 against the prayer of the plaintiffs in error that the Public Service Commission had jurisdiction over the subject matter of the complaint set forth in said petition, and that the same was not within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress, and that said Public Service Commission, therefore, had jurisdiction to enter the order complained of.

3. In that said Court erroneously refused to rule, as requested in the answer of said plaintiffs in error, that said plaintiffs, The Western Union Telegraph Company and the United Telegram Company, would be required, in order to comply with said order, to wit, the order of the Public Service Commission of Massachusetts, to appropriate the property of said New York Stock Exchange for the benefit of said Foster, and thereby destroy their valuable contracts with said Exchange, contrary to the provisions of the Federal Constitution, in that your petitioners would thereby be deprived of their property without due process of law.

4. In that said Court did erroneously rule and decide that your petitioners, The Western Union Telegraph Company and the United Telegram Company, would not be required, in order to comply with said order, to appropriate the property of said New York Stock Exchange, for the benefit of said Foster, contrary to the pro-
114 visions of the Federal Constitution, and that your petitioners would not thereby be deprived of their property by due process of law.

THE WESTERN UNION TELEGRAPH COMPANY,
THE UNITED TELEGRAM COMPANY,
*Plaintiffs in Error (Original Respondents)*,
By ARTHUR LORD,
*Their Solicitor and Counsel.*

[Endorsed:] Supreme Judicial Court, Suffolk, ss. In Equity. No. 24561. Frederick J. Macleod, et al. v. The Western Union Telegraph Co. and The United Telegram Co. Assignment of Errors. Massachusetts Supreme Judicial Court. Filed Aug. 9, 1915. John F. Cronin, Clerk.

115 *(Bond on Writ of Error.)*

Know all men by these presents, That we, The United Telegraph Company, a corporation organized under the laws of the State of New Jersey, as principal and the American Surety Company, a corporation *or* organized under the laws of the State of New York, as surety, are held and firmly bound unto Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, in the full and just sum of Five Hundred (500) Dollars, to be paid to the said Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, their certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our successors jointly and severally, by these Presents.

Sealed with our seals, and dated the 20th day of July, in the year of our Lord one thousand nine hundred and sixteen.

Whereas lately at a session of the Supreme Judicial Court of Massachusetts, in a suit depending in said Court between The United Telegram Company, Petitioner, and Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, Respondents, judgment was rendered against the said United Telegram Company and the said United Telegram Company having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Calvin H. Foster,
116 and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof:

Now the condition of the above obligation is such, that if the said United Telegram Company shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

UNITED TELEGRAM COMPANY, [SEAL.]
By L. WALLACE SWEETSER, *Treas.*
AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
*Resident Vice President.*

Attest:
THOMAS J. GARGAN,
*Resident Assistant Secretary.*

Signed, sealed and delivered in presence of—
W. H. CROSS.

Aug. 8, 1916.

Approved:

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court.*
[SEAL.]

[Endorsed:] Massachusetts Supreme Judicial Court. Filed Aug. 9, 1915. John F. Cronin, Clerk.

117 (Bond on Writ of Error.)

Know all men by these presents, That we, The Western Union Telegraph Company, a corporation organized under the laws of the State of New York, as principal and the American Surety Company, a corporation *or* organized under the laws of the State of New York, as surety, are held and firmly bound unto Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, in the full and just sum of Five Hundred (500) Dollars, to be paid to the said Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, their certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our successors jointly and severally, by these Presents.

Sealed with our seals, and dated the 20th day of July, in the year of our Lord one thousand nine hundred and sixteen.

Whereas lately at a session of the Supreme Judicial Court of Massachusetts, in a suit depending in said Court, between The Western Union Telegraph Company, Petitioners, and Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the Public Service Commission, of Massachusetts, Respondents, judgment was rendered against the said Western Union Telegraph Company and the said Western Union Telegraph Company having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said
118 Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, members of the
[SEAL.] Public Service Commission, of Massachusetts, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof:

Now the condition of the above obligation is such, that if the said Western Union Telegraph Company, shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to

make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By RUSH TAGGART,
*Vice President.* [L. S.]

Teste:
W. H. BAKER, *Secretary.* [L. S.]

AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
*Resident Vice President.*

Attest:
THOMAS J. GARGAN,
*Resident Assistant Secretary.*

Signed, sealed and delivered in presence of
[SEAL.] —— ——.

Aug. 8, 1916.

Approved:
ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

[Endorsed:] Suffolk, ss: Supreme Judicial Court. Filed Aug. 9, 1916. John F. Cronin, Clerk.

119 (*Bond on Writ of Error.*)

Know all men by these presents, That we, The United Telegram Company, a corporation organized under the laws of the State of New Jersey, as principal, and the American Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, in the full and just sum of Five Hundred (500) Dollars, to be paid to the said Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, their certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our successors jointly and severally, by these Presents.

Sealed with our seals, and dated the 20th day of July, in the year of our Lord one thousand nine hundred and sixteen.

Whereas lately at a session of the Supreme Judicial Court of Massachusetts, in a suit depending in said Court between Frederick J. Mac-

leod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, Complainants, and The United Telegram Company Respondent, judgment was rendered
120 against the said United Telegram Company, and the said United Telegram Company, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof:

Now the condition of the above obligation is such, that if the said United Telegram Company shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

UNITED TELEGRAM COMPANY, [SEAL.]
By L. WALLACE SWEETSER, *Treas.*
AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
*Resident Vice President.*

Attest:
THOMAS J. GARGAN,
*Resident Assistant Secretary.*

Signed, sealed and delivered in presence of
[SEAL.] W. H. CROSS.

Aug. 8, 1916.

Approved:
ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

[Endorsed:] Suffolk, ss: Supreme Judicial Court. Filed Aug. 9, 1916. John F. Cronin, Clerk.

121 (*Bond on Writ of Error.*)

Know All Men By These Presents, That we, The Western Union Telegraph Company, a corporation organized under the laws of the State of New York, as principal, and the American Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, in the full and just sum of

Five Hundred (500) Dollars, to be paid to the said Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, their certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our successors jointly and severally, by these Presents.

Sealed with our seals, and dated the 20th day of July, in the year of our Lord one thousand nine hundred and sixteen.

Whereas lately at a session of the Supreme Judicial Court of Massachusetts, in a suit depending in said Court between Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, Complainants, and The Western Union Telegraph Company Respondent, judgment was rendered against the said Western Union Telegraph Com-
122 pany, and the said Western Union Telegraph Company, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof.

Now the condition of the above obligation is such, that if the said Western Union Telegraph Company shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By RUSH TAGGART,
*Vice President* [L. S.]

Teste:
W. H. BAKER, *Secretary.* [L. S.]

AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
*Resident Vice President.*

Attest:
THOMAS J. GARGAN,
*Resident Assistant Secretary.*

Aug. 8, 1916.

Signed, sealed and delivered in presence of
[SEAL.] ——— ———.

Approved:
ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

[Endorsed:] Suffolk, ss: Supreme Judicial Court. Filed Aug. 9, 1916. John F. Cronin, Clerk.

123 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Calvin H. Foster and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, Members of the Public Service Commission of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Judicial Court of the Commonwealth of Massachusetts wherein The Western Union Telegraph Company and The United Telegram Company, the original petitioners, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts, this eighth day of August, in the year of our Lord one thousand nine hundred and sixteen.

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

124 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Calvin H. Foster and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, Members of the Public Service Commission of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Judicial Court of the Commonwealth of Massachusetts wherein The Western Union Telegraph Company and The United Telegram Company, the original petitioners, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the

Supreme Judicial Court of Massachusetts, this eighth day of August, in the year of our Lord one thousand nine hundred and sixteen.

A true Copy:

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

125 UNITED STATES OF AMERICA.
*District of Massachusetts, ss:*

BOSTON, August 12th, 1916.

I hereby certify that I have this day delivered to the within-named Calvin H. Foster, in hand at his office at said Boston, an attested copy of a citation (duplicate of the within) the original of which is on file in the Clerk's Office of the Supreme Judicial Court of Massachusetts, at said Boston.

JOHN J. MITCHELL,
*U. S. Marshal,*
By CHARLES A. BANCROFT,
*Deputy.*

Fees:

| | |
|---|---|
| Service | $2.00 |
| Travel | .06 |
| | $2.06 |

BOSTON, August 11, 1916.

Service of the within citation upon the within-named member of the Public Service Commission of Massachusetts is hereby acknowledged.

H. WARE BARNUM,
*Assistant Attorney General.*

[Endorsed:] Marshal's No. 888. United States Marshal's Office, P. O. Building, Boston, Mass. Aug. 12, 1916. Arthur Lord, Att'y, 70 State St., Boston. Main 3472.

126 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Judicial Court of the Commonwealth of Massachusetts wherein The Western Union Telegraph Company and The United Telegram Com-

pany, the original respondents, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts, this eighth day of August, in the year of our Lord one thousand nine hundred and sixteen.

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

127 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frederick J. Macleod, Everett E. Stones, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Judicial Court of the Commonwealth of Massachusetts wherein The Western Union Telegraph Company and The United Telegram Company, the original respondents, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts, this eighth day of August, in the year of our Lord one thousand nine hundred and sixteen.

A true Copy:

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

128 BOSTON, MASS., Aug. 11, 1916.

Service of the within citation is acknowledged for the within-named persons constituting the Public Service Commission of the Commonwealth of Massachusetts.

H. WARE BARNUM,
*Assistant Attorney General.*

129 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Supreme Judicial Court.

In Equity.

WESTERN UNION TELEGRAPH Co. et al., Plaintiffs in Error,
vs.
FREDERICK J. MACLEOD et als., Defendants in Error.

*Præcipe.*

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk:

Please incorporate into the transcript of the record, to accompany your return to the writs of error, the reservation to the Supreme Judicial Court, rescripts and final decrees, besides copies of petitions for writs of error, assignments of error, bonds and citations, and proceedings thereon, and copy of opinion of full bench, the Counsel for the plaintiff in error deeming the above portions of the record to be material to and necessary for a decision of the questions involved.

You may also annex a copy of the pleadings.

Yours respectfully,

ARTHUR LORD.

August 24, 1916.

130 I, Arthur Lord, Counsel for the plaintiffs in error, declare and state that I have served a copy of the foregoing præcipe on the defendants by sending a copy thereof, by mail, addressed to H. Ware Barnum, Esq., Assistant Attorney-General, Counsel for the respondent, The Public Service Commission, and to P. H. Kelley, Esq., Counsel for the respondent, Foster, at his office, 16 State St., Boston, Massachusetts, postage prepaid, on Aug. 24, 1916.

COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

BOSTON, August 24, 1916.

Then personally appeared the above named Arthur Lord and made oath that the foregoing statements by him subscribed are true.

Before me:

[Seal Edwin P. Fitzgerald, Notary Public, Commonwealth of Massachusetts, U. S. A.]

EDWIN P. FITZGERALD,
*Notary Public.*

131 *Certificate of Lodgment.*

Supreme Judicial Court, County of Suffolk.

I, John F. Cronin, Clerk of said Court, do hereby certify that there was lodged with me as such clerk, on August 9, 1916, in the matter of Western Union Telegraph Company et al., vs. Frederick J. McLeod et als.,

1. The original bonds of which copies are herein set forth.
2. Four copies of the Writ of Error, as herein set forth, one for each defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at my office, in Boston, Mass., this August 26th 1916.

[SEAL.] JOHN F. CRONIN, *Clerk.*

132 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court, within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of Western Union Telegraph Co. et al. Plaintiffs vs. Frederick J. Macleod et al. Defendants, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this twenty-sixth of August in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] JOHN F. CRONIN, *Clerk.*

Endorsed on cover: File No. 25,510. Massachusetts Supreme Judicial Court. Term No. 680. Western Union Telegraph Company and United Telegram Company, plaintiffs in error, vs. Calvin H. Foster, and Frederick J. Macleod et al., Members of the Public Service Commission of Massachusetts. File No. 25,511. Term No. 681. Western Union Telegraph Company and United Telegram Company, plaintiffs in error, vs. Frederick J. Macleod et al., constituting The Public Service Commission of the Commonwealth of Massachusetts. Filed September 28th, 1916. File Nos. 25,510 and 25,511.

FILED
MAR 8 1918
JAMES D. MAHER
CLERK

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1917.

WESTERN UNION TELEGRAPH COMPANY AND UNITED TELEGRAM COMPANY, *Plaintiffs in Error,*

*against*

CALVIN H. FOSTER AND FREDERICK J. MACLEOD *et al.*, MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *Defendants in Error.*

No. 274.

WESTERN UNION TELEGRAPH COMPANY AND UNITED TELEGRAM COMPANY, *Plaintiffs in Error,*

*against*

FREDERICK J. MACLEOD *et al.*, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS, *Defendants in Error.*

No. 275.

WRITS OF ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

## BRIEF FOR PLAINTIFFS IN ERROR.

RUSH TAGGART,
JOHN G. MILBURN,
ARTHUR LORD,
*For Plaintiffs in Error.*

The Evening Post Job Printing Office, Inc., 150 Fulton St., N. Y.

# INDEX.


PAGE

STATEMENT OF THE CASE..... ..... 1-3

These are writs of error to the Supreme Judicial Court of Massachusetts to review judgments of that Court sustaining the validity of an order of the Public Service Commission.

FACTS ..... 3-16

ASSIGNMENTS OF ERROR..... 16-17

POINTS ..... 18

ARGUMENT ..... ..... 19-54

I. The transactions affected by the order of the Public Service Commission constitute interstate commerce and the order of the Public Service Commission is invalid because it attempts to regulate such commerce..... 19-29

II. The matters affected by the order of the Public Service Commission are within the sole jurisdiction of the Interstate Commerce Commission. 29-35

III. The order of the Public Service Commission cannot be sustained as directed towards the protection of Foster in the enjoyment of a common law right for the enforcement of which the jurisdiction of the Interstate Commerce Commission is not exclusive..... 36-49

IV. The order of the Public Service Commission deprives the plaintiffs in error of their property without due process of law..... 49-54

## CITATIONS.


PAGE

Adams Express Co. *vs.* Croninger, 226 U. S. 491 ..... 33

Adams Express Co. *vs.* Ohio State, 166 U. S. 185 ..... 28

Allgeyer *vs.* Louisiana, 165 U. S. 578 ..... 28

Atchison, Topeka & Santa Fe R. R. Co. *vs.* Robinson, 233 U. S. 173 ..... 33

Bailey *vs.* Western Union Tel. Co., 97 Kan. 619 ..... 35

Aff'd on rehearing, 99 Kan. 7 ..... 35

Baltimore & Ohio R. R. Co. *vs.* Pitcairn Coal Co., 215 U. S. 481 ..... 32

Board of Trade *vs.* Christie, 198 U. S. 236 ..... 48, 49

Boston & Maine R. R. Co. *vs.* Hooker, 233 U. S. 97 ..... 33

Boyce *vs.* Western Union Tel. Co., 119 Va. 14. 35

Cain *vs.* Western Union Tel. Co., 10 Ohio Decisions (Reprint) 79 ..... 25

Caldwell *vs.* North Carolina, 187 U. S. 622 ... 22

C. B. & Q. R. R. Co. *vs.* Illinois, 200 U. S. 561. 51

Coe *vs.* Errol, 116 U. S. 517 ..... 23

Crutcher *vs* Kentucky, 141 U. S. 47 ..... 29

Cultra *vs.* Western Union Tel. Co., 44 I. C. C. 670 ..... 33

Erie R. R. Co. *vs.* People of the State of New York, 233 U. S. 671 ..... 33

Fargo *vs.* Hart, 193 U. S. 490 ..... 28

Forster *vs.* Scott, 136 N. Y. 577 ..... 51

Friedman *vs.* Gold & Stock Tel. Co., 32 Hun, 4 ..... 37

Gardner *vs.* Western Union Tel. Co., 231 Fed. 405; Writ of *Certiorari* denied, 243 U. S. 644 ..... 33

PAGE

Haskell Implement Co. *vs.* Postal Tel. Cable Co., 114 Me. 277 ..... 35
Hunt *vs.* New York Cotton Exchange, 205 U. S. 322 ..... 48, 49, 50

Illinois Central R. R. Co. *vs.* Fuentes & Co., 236 U. S. 157 ..... 23
Illinois Central R. R. Co. *vs.* Mulberry Coal Co., 238 U. S. 275 ..... 37
International Text Book Co. *vs.* Pigg, 217 U. S. 91 .. ..... 29

Louisville and Nashville R. R. Co. *vs.* West Coast N. S. Co., 198 U. S. 483 ..... 52
L. & N. R. Co. *vs.* Central Stockyards Co., 212 U. S. 132 ..... 52

Matter of Renville, 46 N. Y. App. Div. 37 .... 39, 49
Meadows *vs.* Postal Tel. Cable Co., 182 N. Car. 40 ..... 35
Missouri Pacific Ry. *vs.* Nebraska, 217 U. S. 196 ..... 53
Morrisdale Coal Co. *vs.* Pennsylvania R. R. Co., 230 U. S. 304 ..... 32

Oregon R. R. & N. Co. *vs.* Fairchild, 224 U. S. 510 ..... 52

Pennsylvania R. R. Co. *vs.* Puritan Coal Co., 237 U. S. 121 ..... 36
Pullman Company *vs.* Adams, 189 U. S. 420. 29

Railroad Commission of La. *vs.* Texas Pac. R. R. Co., 229 U. S. 336 ..... 23
Renville, Matter of, 46 N. Y. App. Div. 37... 39, 49
Rierck *vs.* Pennsylvania, 203 U. S. 507 ..... 22
Robinson *vs.* Baltimore & Ohio R. R. Co., 222 U. S. 506 ..... 32

PAGE

Shepard *vs.* Gold & Stock Tel. Co., 38 Hun, 338 ..... 37
Sioux Remedy Co. *vs.* Cope, 235 U. S. 197... 29
Smith *vs.* Gold & Stock Tel. Co., 42 Hun, 454. 37
Southern Ry. Co. *vs.* Reid, 222 U. S. 424..... 33
St. Louis & San Francisco R. R. *vs.* Seale, 229 U. S. 156..... 23
St. Louis, Iron Mountain & Southern Ry. Co. *vs.* Edwards, 227 U. S. 265..... .... 33
State of Missouri *ex rel.* Baltimore & Ohio Tel. Co. *vs.* Bell Tel. Co., 23 Fed. Rep. 539. 37
Strauss Gas Iron Co. *vs.* Western Union Tel. Co., 23 Pa. Dist. R. (Phil.) 291..... 35
Aff'd. 59 Pa. Super Ct. 122 ..... 35
Swift & Company *vs.* United States, 196 U. S. 375 ..... 23

Texas & New Orleans Ry. Co. *vs.* Sabine Tram Co., 227 U. S. 111..... 23
Texas Pac. R. Co. *vs.* Abilene Co., 204 U. S. 426 ..... 32
Tucker *vs.* Western Union Tel. Co. *et als.* 158 N. Y. Supp. 959..... 42
Order aff'd 171 N. Y. A. D. 965..... 43

Weems Steamboat Co. *vs.* Peoples Co. 214 U. S. 345..... 51
Western Oil Refining Co. *vs.* Lipscomb, 244 U. S. 346..... 22
Western Union Tel. Co. *vs.* Bassett, 111 Miss. 468..... 35
Western Union Tel. Co. *vs.* E. A. Bilisoly, 116 Va. 562..... 34
Western Union Tel. Co. *vs.* Brown, 234 U. S. 542..... 28
Western Union Tel. Co. *vs.* Compton, 114 Ark. 193..... 35
Western Union Tel. Co. *vs.* Culpepper, 120 Ark. 319..... 35

PAGE

Western Union Tel. Co. *vs.* Dant, 42 App. Cas. (Dist. of Col.) 398 ..... 33

Western Union Tel. Co. *vs.* First National Bank of Berryville, 116 Va. 1009 ..... 35

Western Union Tel. Co. *vs.* Lee, 174 Ky. 210. 35

Western Union Tel. Co. *vs.* Kansas, 216 U. S. 1 ..... 28

Western Union Tel. Co. *vs.* Pendleton, 122 U. S. 347 ..... 28

Western Union Tel. Co. *vs.* Showers, 112 Miss. 411 ..... 35

W. N. White *vs.* Western Union Tel. Co., 33 I. C. C. 500 ..... 33

Williams *vs.* Western Union Tel. Co., 203 Fed. 140 ..... 33

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1917.

| | |
|---|---|
| WESTERN UNION TELEGRAPH COMPANY and UNITED TELEGRAM COMPANY, Plaintiffs-in-Error, AGAINST CALVIN H. FOSTER and FREDERICK J. MACLEOD *et al.*, MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, Defendants-in-Error. | No. 274. |
| WESTERN UNION TELEGRAPH COMPANY and UNITED TELEGRAM COMPANY, Plaintiffs-in-Error, AGAINST FREDERICK J. MACLEOD *et al.*, Constituting THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants-in-Error. | No. 275. |

## BRIEF FOR PLAINTIFFS IN ERROR.

### Statement.

These are writs of error to the Supreme Judicial Court of Massachusetts to review judgments of that

Court sustaining the validity of the following order of the Public Service Commission of Massachusetts:

> "It appearing that the Gold & Stock Telegraph Company by the Western Union Telegraph Company lessee and the United Telegram Company have without just cause denied and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination and it is ordered that the Gold & Stock Telegraph Company by the Western Union Telegraph Company lessee and the United Telegram Company shall forthwith remove said discrimination" (p. 6).

The Western Union Telegraph Company and the United Telegram Company presented their petition to the Supreme Judicial Court of Massachusetts, making Calvin H. Foster and the Members of the Public Service Commission respondents, for the purpose of having this order annulled (pp. 5 *et seq.*). The Members of the Public Service Commission filed a bill of complaint against the Western Union Telegraph Company and the United Telegram Company asking for a mandatory injunction requiring the Telegraph Companies to comply with the order (pp. 58 *et seq.*). Answers in the first proceeding having been filed by Calvin H. Foster (p. 57) and by the Public Service Commission (p. 58), and in the second proceeding by the Western Union Telegraph Company and the United Telegram Company (pp. 61, 62), and the proceedings having come on to be heard upon the petition and answers in the one case and upon the bill of complaint and answer in the other, all questions were reserved for the consideration of the Full Court (p. 4). After a hearing before the Full Court a final decree was entered in the proceeding brought by the Telegraph Com-

panies dismissing their petition and a final decree was entered in the proceeding brought by the Public Service Commission commanding and enjoining the Telegraph Companies forthwith to comply with the order of the Public Service Commission (pp. 64, 65). These are the decrees which it is sought to review.

The proceeding in which the order of the Public Service Commission was entered was instituted by a complaint filed by Foster with the Public Service Commission (pp. 20, 21) to which answers were filed by the Western Union Telegraph Company (pp. 21 to 48) and by the United Telegram Company (pp. 48 to 57). No testimony was taken before the Public Service Commission, the questions raised being decided upon Foster's complaint and the answers thereto. The record before the Public Service Commission including the complaint and answers and the report of the Commission were all made a part of the petition filed by the Telegraph Companies in the proceeding brought by them in the Supreme Judicial Court (pp. 7 *et seq.*), and this entire petition was made a part of the answer filed by the Telegraph Companies to the bill of complaint brought by the Public Service Commission (pp. 61, 62).

## The Facts.

The substance of the complaint filed by Foster with the Public Service Commission is that in December, 1914, the stock tickers which he had in his office at 246 Washington Street, Boston, were removed; that thereafter he made application to the Telegraph Companies for quotation service offering to pay their charges; that after the first of

December the Telegraph Companies would not furnish quotation service unless the application therefor was approved by the Committee on Quotations of the New York Stock Exchange and that although he had appeared before that Committee and given a full statement of his business no action had been taken on his application (pp. 20, 21).

The Western Union Telegraph Company in its answer to Foster's complaint (pp. 21 *et seq.*) shows:

The Stock Exchange is a voluntary association having control of the building in which it is located and upon the floor of which under rules established by it the eleven hundred members deal with each other in selling and buying securities either on behalf of the members or on behalf of persons employing them to act as their brokers. Prior to 1892 the employees of the Gold & Stock Telegraph Company, or of the Western Union Telegraph Company, its lessee, were permitted to go upon the floor of the Exchange and collect and collate the quotations of transactions and to transmit these quotations by wire to subscribers. In 1892 the Stock Exchange excluded the employees of the Telegraph Company from its floor and thereafter itself through its own employees collected the quotations, and entered into a contract with the Western Union Telegraph Company governing their distribution. This contract continued in force until 1900, when it was superseded by a new contract which continued until the Exchange was closed in August, 1914. At that time the Exchange and the Telegraph Company were engaged in negotiating a new contract which was executed on the 9th day of September, 1914, but was dated July 1st. All three contracts are annexed to the

answer, the contract of 1914 being Exhibit C. On the 22nd of October, 1914, in accordance with the terms of the contract Exhibit C, the Telegraph Company transmitted to the Exchange Foster's application for continuous quotations for approval by the Exchange without which under the terms of the contract Exhibit C it was not at liberty to furnish such quotations to Foster. The Stock Exchange has not approved the application, and has advised the Telegraph Company that it has declined to approve it. The Telegraph Company has no information as to the statements contained in the complaint in regard to Foster's business relations in Boston. The Telegraph Company avers that any order of the Public Service Commission directing it to furnish quotations to Foster would require it to appropriate the property of the Stock Exchange and would destroy its contract with the Exchange and deprive it of its property without due process of law and ask that the complaint be dismissed for the reason that the Public Service Commission is without jurisdiction over the matters stated in the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission, and for the reason that upon the facts stated the Telegraph Company has no legal right to render the service demanded in the complaint in view of its contract with the Exchange.

The contract of 1914 between the Telegraph Company and the Exchange Exhibit C (pp. 40 to 48) provides:

> "FIRST: The Exchange agrees, at its own expense, to furnish to the Telegraph Company, under the limitations, conditions and restrictions hereinafter prescribed, full and continuous quotations of prices made in transactions upon the Exchange * * *.

SECOND: The Transmitter of the Telegraph Company operating its own or Gold and Stock tickers in the City of New York shall be located in the room in the basement of the building occupied by the Exchange heretofore and now used by the Telegraph Company as its transmitting room.

The Telegraph Company shall run and maintain a cable containing wires from its said transmitting room to such place in said building as may be from time to time designated by the Exchange; and shall furnish in the same place a keyboard connected with said cable, by means of which the transmitter located in the said transmitting room shall be operated.

The Exchange shall maintain Morse telegraph instruments on the floor of the Exchange and a wire running from each of said instruments to a receiving Morse instrument at said keyboard; and shall by its own operators transmit said quotations directly and promptly over said wires to said receiving instrument, or such transmission may be by such other means as may be hereafter mutually agreed upon. The Telegraph Company shall by its own operators take off from the said receiving instrument the said quotations, and transmit the same to its said transmitter by means of the keyboard and cable aforesaid * * * No tickers shall be connected with, or operated from, said transmitter except Western Union or Gold and Stock tickers located in the offices of persons to whom the Telegraph Company furnishes said quotations after full compliance with the limitations, conditions and provisions of this contract; and one ticker located in said transmitting room of the Telegraph Company and one or more tickers located in the relaying rooms of the Telegraph Company. The Telegraph Company may furnish said quotations, or any part thereof, or any information therein contained, to its patrons by means of tickers, or by tele-

graph or telephone wires and instruments, or may deliver them by messengers or otherwise as it may elect, subject to the limitations, conditions and provisions hereinafter contained. * * * Neither said quotations nor any part thereof nor any information therein contained shall be furnished by the Telegraph Company or its employees to any person or in any manner except as herein provided.

None of said quotations shall be sent out by the Telegraph Company except those sent over ticker circuits connected with the transmitter located in the basement of the Stock Exchange, or by relaying from a ticker connected with said transmitter.

THIRD: So long as the New York Quotation Company shall furnish the quotations of the Exchange to any person or persons the furnishing of such quotations to the Telegraph Company shall be simultaneous with, and performed in like and equal manner and time, as in the case of the New York Quotation Company; and no preference shall be given either Company in respect thereto. * * *

FOURTH: The Telegraph Company may furnish said quotations to any person whether a member of the Exchange or not anywhere in the United States or Canada outside of that portion of the Borough of Manhattan lying south of Chambers Street; and may also furnish the same by ticker to any person who is not a member of the Exchange, and to each director of the Telegraph Company who is also a member of the Exchange, at his or their office or offices in the Borough of Manhattan, South of Chambers Street; provided, however, that the Telegraph Company shall not after the first day of November, 1914, furnish quotations, by ticker or otherwise, in the volume of a continuous service, which is defined to be oftener than at intervals of fifteen (15) min-

utes (and is herein referred to as continuous quotations) to any subscriber therefor unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company, and the subscriber shall have been approved by the Exchange, the said application to be substantially as follows:"

(Here follows the form of application which is hereafter summarized.)

"One of said applications when signed shall be delivered to the Exchange; but said application and the acceptance thereof by the Telegraph Company shall not be effectual for any purpose until the subscriber is approved by the Exchange. Notice shall be promptly given by the Exchange of its approval or disapproval of the applicant.

It is understood and agreed, however, that the Telegraph Company may furnish any quotations furnished to it hereunder to its patrons at intervals of more than fifteen (15) minutes without requiring such patrons to sign said application form; but the Telegraph Company shall furnish to the Exchange a list of such patrons monthly, and shall discontinue such service to any thereof to whom the Exchange may object. * * *

SIXTH: * * * The Telegraph Company shall, unless enjoined by any Court from doing so, discontinue furnishing said quotations to any person whether a member or non-member of the Exchange whenever notified by the Exchange of its disapproval of such person, but in all cases of discontinuance, pursuant to notice given by the Exchange, the Exchange shall indemnify and save harmless the Telegraph Company from all costs, damages or liability which it may incur by reason of such discontinuance.

SEVENTH: The charge made by the Telegraph Company to members of the Exchange for furnishing the continuous quotations aforesaid to the offices of such members in the Borough of Manhattan north of Chambers Street and south of Sixtieth Street, by means of tickers located in such offices, shall not exceed twenty-five Dollars ($25) a month for each ticker. The charge made by the Telegraph Company for furnishing said quotations to members of the Exchange wherever located shall not in any case exceed the charge for such service made to any non-member similarly located.

EIGHTH: The Telegraph Company agrees to pay to the Exchange at the rate of Fifty thousand Dollars ($50,000) per annum during the continuance of this agreement, in equal monthly installments of Four thousand one hundred and sixty-six and 67/100 ($4,166.67) Dollars on the last day of each month * * *.

* * * * *

TENTH: Nothing herein contained shall be construed to entitle the Telegraph Company to furnish said quotations to members of the Exchange in the Borough of Manhattan south of Chambers Street, excepting Directors of the Telegraph Company who are members thereof. The Exchange reserves the right to contract with any other Telegraph Company to furnish said quotations to it; but in case it shall enter into any such contract or contracts the quotations furnished thereunder shall be identical with the quotations furnished to the Telegraph Company pursuant to the provisions hereof, and shall be furnished to the Telegraph Company simultaneously with the furnishing thereof to such other company or companies, and shall be furnished to such other company or companies, subject to limitations, conditions and restrictions substantially identical with those prescribed by this agreement. * * *

ELEVENTH: It is understood and agreed that as to the right of the Exchange, hereinbefore specified, to disapprove applicants for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations."

The form of application to be signed by all applicants for continuous quotations which is incorporated in the contract contains the following provisions (pp. 43, 44):

"THE WESTERN UNION TELEGRAPH COMPANY:

We hereby apply to you for service of continuous quotations of the New York Stock Exchange, furnished you under contract between you and said Exchange, said quotations to be furnished to us at
by ; and we represent and agree with you as follows:

* * * * *

(2) That said quotations are to be received by us only for our private and individual use in our said business at the office or place above designated; and we will not communicate or otherwise furnish or permit to be communicated or otherwise furnished said quotations to any news distributing company or telegraph company, or any person or corporation, nor to any other place than that above designated, nor allow any person or corporation whatsoever to take directly or indirectly said quotations from said office. But nothing herein contained shall preclude us from furnishing said quotations to any branch office of ours, nor to any of our correspondents, provided that said branch office or offices shall first be approved by the New York Stock Exchange, and further provided that before furnishing said quotations to any such correspondent such correspondent shall be approved by the New York Stock Ex-

change, and we shall first obtain in duplicate (one of which shall be delivered to you and one to the New York Stock Exchange) an agreement signed by such correspondent in which said correspondent shall agree with the Western Union Telegraph Company to abide by and comply with clauses 1, 2, 3, 4, and 7 hereof. * * *

(3) That the office or place above designated shall not be connected by any private tel egraph or telephone wire, or other wire connection, or other means of communication, with the office or place of business of any person or persons, or corporations, engaged in the business of making contracts, agreements, trades or transactions respecting the purchase and sale of stocks, bonds or other securities or commodities, or with any place where such business is conducted, unless the New York Stock Exchange shall have been notified of such connection and shall not have disapproved the same; nor with any branch office or correspondent excepting such branch offices and correspondents as have been approved by the New York Stock Exchange as provided in Clause 2 hereof. But nothing in this clause contained shall be construed as applying to the private wire connections of members of the New York Stock Exchange which have been approved in conformity with its rules.

(4) That at any and all times any person or persons designated by the said Telegraph Company or the said New York Stock Exchange shall have access to the office or place above designated, and the right to observe the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service in said office or place.

(5) That the Western Union Telegraph Company may, with or without notice, forth-

with discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements or any of them by the undersigned, or whenever directed so to do by said New York Stock Exchange.

* * * * *

(7) That quotations upon any stock, bond or other security at intervals of fifteen (15) minutes or less shall be deemed to be continuous quotations within the meaning of this application.

Accepted:

THE WESTERN UNION TELEGRAPH COMPANY,

By.....

Applicant approved:

NEW YORK STOCK EXCHANGE,

By....."

The answer of the United Telegram Company to Foster's complaint is substantially similar to the answer of the Western Union Telegraph Company. The contract with the Exchange which is annexed to its answer and made a part of it provides that the quotations shall be furnished to the Telegraph Company by means of the New York Quotation Company's ticker in the office of the Postal Telegraph Company in the Borough of Manhattan, City of New York. The Telegram Company is permitted to furnish the quotations only to subscribers at their offices in the City of Boston. The amount to be paid to the Exchange is Nine thousand a year. In other respects the United Telegram Contract is similar to the Western Union contract. The Telegram Company annexes to its answer the notice

from the Exchange disapproving Foster's application. The notice is as follows:

(See Exhibit B, p. 56.)

"NEW YORK, April 16, 1915.

"CHARLES F. PARKER, Esq., President, United Telegram Company,
Boston.

DEAR SIR:—

I beg to inform you that the Committee on Quotations has disapproved application of Mr. Calvin H. Foster of Boston.

Mr. Foster appeared before the Committee on Quotations, on Wednesday, January 20, 1915, and made a statement extracts from which are sent you herewith.

Yours truly,
GEORGE W. ELY, Secretary.

(Extracts from Testimony of Calvin H. Foster.)

The Chairman: Now, Mr. Foster, you have mentioned three concerns—The Metropolitan Stock Exchange, the Tremont Exchange and the Boston Stock & Grain Exchange—that you have been connected with.

Mr. Foster: Yes, sir.

The Chairman: Were all three of these concerns bucket-shops?

Mr. Foster: Well, I think very likely they were considered such, but I am not sure. Well, the Metropolitan was, I think, considered a bucket-shop.

The Chairman: Now, let us get down to business. You have presented a record which shows a long connection, in one way or another, with bucket-shops?

Mr. Foster: Yes, sir.

The Chairman: That is exactly what this Committee is trying to prevent.

Mr. Foster: Well, I haven't done anything of the kind since 1907, and I don't want to do anything of the kind, and have no intention of doing anything of the kind. I never would allow an order executed in my office for a customer under any circumstances whatever. I always went to the people that I did business with, and I think my record is clear in connection with doing business that way since 1907, when the Massachusetts Anti-Bucket shop law was passed.

The Chairman: You still want the record to appear that you have never had any connection with the Federal Stock & Grain Co.?

Mr. Foster: Yes, sir. I most emphatically do, because I have been very careful to look that up myself, and I have looked up all the records and I am just as sure as I can be, as anything can be, that I never had anything whatever to do with that Company.

The Chairman: But the facts are that you were doing business through the Metropolitan, The Tremont and the Boston Stock & Grain Exchange and with The Cella Commission Co. and N. J. Sage & Co., at one time or another?

Mr. Foster: Yes, sir."

The Telegraph Companies in their petition to the Supreme Judicial Court of Massachusetts asking to have the order of the Public Service Commission annulled, and also in their answer to the bill of complaint filed by the Public Service Commission aver that the Public Service Commission is without jurisdiction over the subject matter of Foster's complaint the same being within the sole jurisdiction of the Interstate Commerce Commission, and that the order requires them to appropriate the property of the Stock Exchange for the benefit of Foster thereby destroying their valuable contracts

with the Exchange contrary to the provisions of the Federal Constitution in that they would thereby be deprived of their property without due process of law (pp. 61, 62).

The Supreme Judicial Court of Massachusetts in its opinion holds:

That each of the contracts between the Exchange and the Telegraph Company constitutes in effect "a kind of sale of the quotations from the Stock Exchange to the Telegraph Company"; that the only limitation upon the absolute right of the Telegraph Company to deal with the quotations as its own are those tending to prevent the destruction of their value by being taken surreptitiously or otherwise and that no one should be furnished a ticker without approval of the Stock Exchange for the single purpose of preventing the illegal use of the information; that the Telegraph Companies "acquire a kind of right in the quotations which has some of the incidents of property"; that when the Stock Exchange parted with that right to such a person as the Telegraph Company it subjected that right to the necessary characteristics and limitations which inevitably attach to rights belonging to such an owner (p. 69); that the rights acquired by the Telegraph Company in the quotations under their contracts with the Exchange are subject to regulation by public boards and that the condition in the contracts whereby the attempt is made to limit the persons to whom the quotations may be delivered cannot stand against regulation by a public authority to insure indiscriminate distribution (p. 70); that it is unimportant that the Stock Exchange is not a party to the proceedings which deal only with rights acquired by the Telegraph Com-

panies in the quotations; that the transaction in question did not constitute Interstate Commerce because the quotations were sent by the Morse Code from New York to the Boston office of the Telegraph Companies where they were transferred by their own employees to instruments of a different character for delivery to their patrons in Boston; that the Interstate transmission ended when the quotations reached the Boston offices; that the subsequent acts in delivering information upon the tickers were new and independent transactions; that the Federal Interstate Commerce Act does not apply because it does not cover the local delivery by the ticker service; that it is unnecessary to decide whether the order of the Public Service Commission might be sustained as affecting interstate commerce only incidentally and not imposing a direct burden upon it.

## Assignments of Error.

The assignments of error in each case are as follows:

1. That the Public Service Commission is without jurisdiction over the subject matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress and said Public Service Commission, therefore, had no jurisdiction to enter the order complained of.

2. That said Court did erroneously rule and decide against the prayers of the plaintiffs in error that the Public Service Commission had jurisdic-

tion over the subject matter of the complaint set forth in said petition, and that the same was not within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress, and that said Public Service Commission therefore had jurisdiction to enter the order complained of.

3. That said court erroneously refused to rule as requested in the petition of said plaintiffs in error, that said plaintiffs, the Western Union Telegraph Company and the United Telegram Company would be required, in order to comply with said order, to wit, the order of the Public Service Commission of Massachusetts, to appropriate the property of said New York Stock Exchange for the benefit of said Foster, and thereby destroy their valuable contracts with said Exchange contrary to the provisions of the Federal Constitution, in that your petitioners would thereby be deprived of their property without due process of law.

4. That the said Court did erroneously rule and decide that your petitioners, the Western Union Telegraph Company and the United Telegram Company, would not be required, in order to comply with said order, to appropriate the property of said New York Stock Exchange, for the benefit of said Foster, contrary to the provisions of the Federal Constitution, and that your petitioners would not thereby be deprived of their property by due process of law.

## POINTS.

The points of the plaintiffs in error are as follows:

### POINT I.

The matters affected by the order of the Public Service Commission constitute interstate commerce and the order of the Public Service Commission is invalid because it attempts to regulate such commerce.

### POINT II.

The matters affected by the order of the Public Service Commission are within the sole jurisdiction of the Interstate Commerce Commission.

### POINT III.

The order of the Public Service Commission cannot be sustained as directed towards the protection of Foster in the enjoyment of a common law right for the enforcement of which the jurisdiction of the Interstate Commerce Commission is not exclusive.

### POINT IV.

The order of the Public Service Commission deprives the plaintiffs in error of their property without due process of law.

## ARGUMENT.

In the brief submitted on behalf of plaintiffs in error in opposition to the motion made by the defendant in error Calvin H. Foster to dismiss the writ of error in the case in which he is a party, the contention made by him that no Federal question is involved in the decree sought to be reviewed has been fully discussed and the repetition of the argument is unnecessary.

## POINT I.

**The transactions affected by the order of the Public Servce Commission constitute interstate commerce, and the order of the Public Service Commission is invalid because it attempts to regulate such commerce.**

The order of the Public Service Commission finds that the refusal of the Telegraph Companies to supply Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others is an unjust and unlawful discrimination and orders the Telegraph Companies to remove said discrimination forthwith. This in effect requires the Telegraph Companies to furnish the continuous quotations to Foster on the same terms that they are supplied to others. The terms on which ticker service are supplied to other subscribers are shown in the form of application set out in the contracts between the Exchange and the Telegraph Company (see

pp. 43 *et seq.*, 51 *et seq.*). In the form of application the applicant asks the Telegraph Company "for a service of continuous quotations of the New York Stock Exchange furnished you under contract between you and said Exchange, said quotations to be furnished to us at

by ". The contract referred to in the form of application in each case provides that the continuous quotations are to be furnished by the Exchange to the Telegraph Company in the City of New York. The contract with a Massachusetts subscriber resulting from the acceptance and approval of his application is a contract to furnish to him in Massachusetts quotations to be furnished to the Telegraph Company in New York under the contract between the Exchange and the Telegraph Company. The continuous quotations to which the contract with the subscriber relates are quotations of future transactions to be furnished in future by the Exchange to the Telegraph Company for the essential characteristics of the continuous quotation service is that it provides a substantially contemporaneous report of transactions as they occur on the floor of the Exchange showing the fluctuations in prices from moment to moment. The order of the Public Service Commission therefore requires the Telegraph Companies to furnish to Foster in Massachusetts continuous quotations hereafter as they are obtained in New York and at the same time to disregard the provisions in the contract under which they are to be obtained to the effect that the Telegraph Companies may furnish them only to subscribers approved by the Exchange.

(*a*) The contracts with the subscribers approved by the Exchange and the transmission and delivery

of quotations in fulfilment thereof are matters of interstate commerce.

In considering the question of the interstate or intrastate character of these transactions the exact relations of the Telegraph Companies to the quotations under their contracts with the Exchange are not a matter of special consequence. When the Exchange furnishes quotations to the Telegraph Companies the subscribers to whom they may be delivered have necessarily already been approved by the Exchange and it may fairly be said that the quotations are delivered to the Telegraph Companies for transmission to those subscribers and no others making the relation of the Telegraph Companies to the quotations that of carriers. The Telegraph Companies, on the other hand, have the privilege of furnishing the quotations to all the subscribers they can obtain provided such subscribers agree to use the quotations in accordance with the terms of the form of application and are approved by the Exchange. Inasmuch as they pay for this privilege and retain the amounts paid by the subscribers, they have an interest in the distribution of the quotations beyond their interest in the transmission of ordinary messages. It is not necessary for the present purpose to lay particular emphasis on either aspect of the matter. The contracts with the subscribers are matters of interstate commerce whether the Exchange delivers the quotations to the Telegraph Companies for transmission to the subscribers or the Telegraph Companies procure them from the Exchange. In either case they are received by the Telegraph Companies for the purpose of transmission in fulfilment of the contracts with the subscribers.

The proposition that the transportation from one

State to another and the delivery there of property in execution of a contract contemplating such transportation and delivery is interstate commerce is too well established to call for an extended citation of authorities. *Western Oil Refining Company* vs. *Lipscomb*, 244 U. S. 346, is one of the latest cases in which this Court has had occasion to apply the principle. Plaintiff, an Indiana corporation, for the purpose of filling orders taken by its salesmen in Tennessee shipped into that State a tank car of oil and a carload of barrels and filled the orders from the cars through a traveling agent who drew the oil from the tank into the barrels or into others furnished by the customers and made delivery to the latter collecting the price at the time. The cars were billed to the plaintiff at a point in Tennessee where part of the orders were filled and thence rebilled to the plaintiff at another point in that State where the remaining orders were filled and the supply of oil and barrels exhausted. All this was done in pursuance of plaintiff's plan and intention at the time of the original shipment that the cars should remain at the first place and then proceed to the second. It was held that the movement of the goods to the first place and its continuance thence to the second were connected parts of the continuing interstate commerce movement to the latter and that plaintiff could not be subjected to an occupation or privilege tax under the law of Tennessee because of the sale consummated at either destination.

*Rierck* vs. *Pennsylvania*, 203 U. S. 507;
*Caldwell* vs. *North Carolina*, 187 U. S. 622.

The Supreme Judicial Court of Massachusetts bases its conclusion that the transactions in question do not constitute interstate commerce solely

upon the fact that the quotations are transmitted from New York to Boston by Morse wire and delivered to the customers from Boston by relaying them over a ticker circuit. It overlooks the fact that the quotations are sent to Boston and distributed in the fulfilment of pre-existing contracts with the subscribers. The intention to deliver them to the subscribers exists when they are received in New York and governs the disposition of them until delivered. This fact, according to a long and unbroken line of authorities, marks the transactions as interstate commerce. See cases cited, *supra:*

*St. Louis & San Francisco Railroad* vs. *Seale,* 229 U. S. 156;

*Coe* vs. *Errol,* 116 U. S. 517;

*Texas & New Orleans Railway Co.* vs. *Sabine Tram Co.,* 227 U. S. 111;

*Railroad Commission of Louisiana* vs. *Texas, Pacific Railroad Company,* 229 U. S. 336;

*Swift & Company* vs. *United States,* 196 U. S. 375;

*Illinois Central Railroad Company* vs. *Fuentes & Company,* 236 U. S. 157.

The Supreme Court of Massachusetts thus states its understanding of the transmission from New York to Boston:

"The sending of the quotations from New York to Boston over wires in the ordinary course of telegraphy manifestly was interstate commerce. But, as has been pointed out, the telegraph companies as to their ticker service sent no messages from New York to the individual ticker subscriber. The quotations as messages were sent by the Morse Code from New York to the telegraph companies at their

Boston offices. The quotations there were transferred by their own employees to instruments of a different character. By the ticker service the information was delivered to their patrons in Boston. The telegraph companies, in making this transmutation from the Morse Code telegraphic message, by which the quotations came to New York from their Boston offices, to the plain English of the tape on the ticker service through their own instrumentalities and mechanical devices, and through their own servants in their Boston offices, were pursuing a course somewhat, although not precisely, analogous to breaking—bulk of merchandise received by interstate commerce, putting it into smaller packages and delivering it in retail trade. The interstate transmission ended when the quotations reached the Boston offices. The subsequent acts in delivering the information upon the tickers in the offices of its customers were new and independent transactions. It was in effect a sale at retail of the information which it had received by interstate commerce" (pp. 71 and 72).

There is in these suggestions a misconception, as we think, of the whole system of dealing with these quotations. The news transmitted from New York to Boston by Morse Code is identically the same news which was transmitted to the subscribers over the tickers. The news was sent to Boston by Morse Code for the reason that the operation electrically from New York of a circuit carrying a large number of ticker instruments was not practicable. There was no operation at all equivalent to the breaking of bulk of merchandise, referred to by the Supreme Judicial Court, because there was no change whatever in the news which was sent over the tickers as distinguishable from the news which had come from New York by the

Morse Code. Further, the news contained in these quotations was sent from New York to Boston as only the first step in the transmission of such news from New York to each of the subscribers who were entitled to such news in Boston Such news was further sent from New York to Boston for no other purpose than to be immediately transmitted to these particular subscribers in the performance of the contracts for transmission of such news from New York. Such transmission was from New York to Boston for such purposes only, and the quotations served no other purposes in Boston than the fulfillment of such contracts. The transmission, therefore, in the other form from the main office in Boston after they had been received in Morse Code was only a method employed to carry out the original contracts, and the translation from the Morse Code to the special characters used in the ticker service and printed on the tape for the use of the customers, was to render the news which would be unintelligible in the Morse Code intelligible to the subscriber. Such transmutation in no respect caused one part of the transmission to be interstate commerce and the other part to be intrastate, inasmuch as the operations were all parts of one service.

The case of *Cain* v. *Western Union Tel. Co.*, 10 Ohio Decisions, Reprint 72, is in point. There the Court says that:

> "instead of sending messenger boys from the offices of the Western Union Telegraph Company to these different agents in the different places, they run a wire in the different offices of the brokers and the bankers, and put there an instrument that will write out the communications, which serves, very much better than a

messenger boy could, the purposes of a messenger boy; and I take it that because that system is adopted for the transmission of the information and for carrying on of this business, legally it stands upon no different basis than if each message was sent by the Board of Trade, as we ordinarily send messages, and delivered by a messenger boy."

(*b*) The order of the Public Service Commission is an attempt to regulate interstate commerce and is invalid.

In one aspect of the matter it requires the Telegraph Companies to enter into arrangements with Foster which if effected and carried out would constitute interstate commerce. In another aspect of the matter it makes the right of the Telegraph Companies to bring the continuous quotations into the State for delivery to subscribers who have been approved by the Exchange conditional upon their delivering these quotations to Foster without such approval. In a third aspect it requires the Telegraph Companies to disregard (and presumably to violate or abrogate) the contracts under which alone they can obtain the quotations from the Exchange in New York for delivery to the subscribers in Massachusetts. It is in fact an attempt to regulate the contracts under which the Telegraph Companies obtain the quotations in New York for delivery to subscribers in Massachusetts and the Supreme Judicial Court of Massachusetts in its opinion expressly asserts that those contracts are subject to the regulating power of Massachusetts, saying:

"The contract between the Stock Exchange and the Telegraph Companies was made subsequent to the enactment of the statute, (*i. e.*, the Public Service Law of Massachusetts).

> Manifestly such a contract cannot be pleaded in bar to the valid exercise of the police power under that statute. Contracts, though enforceable when made are not enforceable to override such an exercise of the police power" (p. 71).

The assertion by a state of the power to regulate interstate commerce could not well go further. It may be worth while to consider one or two possible cases of the exercise of the regulatory power claimed for Massachusetts by the Supreme Judicial Court. Lumber is excepted from the commodities clause so that railroads may still transport in interstate commerce lumber manufactured or owned by them. If Massachusetts through its Public Service Commission should make the right of interstate railroad companies to bring lumber into the state for delivery in the fulfillment of antecedent contracts conditional upon its selling lumber to all on equal terms it would not thereby go as far in the regulation of interstate commerce as it does in the present case. A situation more nearly parallel to the present one would arise if a lumber company in another state made a contract with the railroad company to manufacture and deliver to the railroad company all lumber necessary to fulfill contracts of sale made by the railroad company with the approval of the manufacturing company, and if the Public Service Commission of Massachusetts should require the railroad company to sell the lumber to all on equal terms irrespective of the approval or disapproval of the manufacturing company. Even the case last supposed would leave out material elements present here and to make it strictly analogous we should have to suppose the railroad

company to be acting as factor rather than as purchaser and the transfer to its Massachusetts customers to be a transfer not of an absolute property right but of a restricted right of use. If the order of the Public Service Commission in the present case is valid similar orders in all of the three supposed cases would be equally valid.

It is submitted that the order of the Public Service Commission is an attempt to regulate matters of interstate commerce that lie wholly outside of the jurisdiction of Massachusetts and impose burdens upon the carrying on of such commerce that constitute a direct obstruction to it.

The contracts between the Telegraph Companies and the Exchange are wholly outside of the jurisdiction of Massachusetts and the order of the Public Service Commission is invalid in that it attempts to nullify the provisions contained in said contracts.

*Allgeyer* vs. *Louisiana*, 165 U. S. 578;
*Fargo* vs. *Hart*, 193 U. S. 490;
*Adams Express Co.* vs. *Ohio State*, 166 U. S. 185;
*Western Union Tel. Co.* vs. *Kansas*, 216 U. S. 1;
*Western Union Tel. Co.* vs. *Pendleton*, 122 U. S. 347;
*Western Union Tel. Co.* vs. *Brown*, 234 U. S. 542.

The condition which the order imposes upon the right to deliver continuous quotations to subscribers approved by the Exchange, to wit, that said quotations shall also be delivered to applicants whom the Exchange has disapproved is a direct

burden upon interstate commerce and renders the order invalid.

*Crutcher* vs. *Kentucky*, 141 U. S. 47;
*Pullman Company* vs. *Adams*, 189 U. S. 420;
*International Text Book Co.* vs. *Pigg*, 217 U. S. 91;
*Sioux Remedy Co.* vs. *Cope*, 235 U. S. 197.

## POINT II.

**The matters affected by the order of the Public Service Commission are within the sole jurisdiction of the Interstate Commerce Commission.**

The amendments to the Act to regulate commerce adopted in 1910 brought within the scope of the Act telegraph, telephone and cable companies engaged in sending messages from one state to another. Section 15 of the Act as amended reads as follows:

> "Whenever, after full hearing upon a complaint made as provided in Section Thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever) the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provision of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the First sec-

tion of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulations or practice so prescribed."

This provision places under the authority of the Interstate Commerce Commission not only the rates, classifications and regulations of telegraph companies but also all "practices" whatsoever, and empowers it upon the complaint of any citizen or upon its own initiative to ascertain whether the regulations or practices of such companies are unjust or unreasonable or unjustly discriminatory and to make its order as to what practices are just, fair and reasonable and to be thereafter followed. The complaint made by the defendant in error Foster to the Public Service Commission of Massachusetts was to the effect that the refusal of the Telegraph Companies to furnish him the con-

tinuous quotation service was an unjust and unlawful discrimination. The answers of the plaintiffs in error to Foster's complaint set up and the Public Service Commission and the Supreme Judicial Court of Massachusetts find that the refusal of the Telegraph Companies to furnish ticker service was based upon and called for by the terms of the contracts under which the Telegraph Companies received the quotations for transmission. The plaintiffs in error maintain that the question whether the refusal to furnish the quotations to Foster was unduly discriminatory involved necessarily the question of the reasonableness or unreasonableness of the terms upon which the Telegraph Companies received the quotations for distribution and was therefore a question which the Interstate Commerce Commission in the first instance had sole jurisdiction to determine. The receipt and distribution of the quotations upon the terms stated in the contract is the practice adopted by the Telegraph Companies in respect to such distribution. Whether this practice is just and reasonable within the meaning of the Interstate Commerce Act which authorizes telegraph companies to classify messages into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and forbids them to subject any particular person, company, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage or whether it subjects Foster to an unjust discrimination is a question that calls for the exercise of the administrative power and discretion of the Commission. The requirements for the transmission of the quotations in such a manner as properly to serve the needs of

the parties in interest are so peculiar, that they would necessarily be the subject of a special classification even if the Exchange as it might readily do should take into its own hands all dealings with applicants for subscriptions eliminating the telegraph companies from any connection with the matter except the transmission of the quotations at fixed tariff rates to persons designated by the Exchange. The convenience of the Exchange and the Telegraph Companies, and of the subscribers also, and the desire at the same time to protect the public effectually against the evils of bucket shops, have dictated the present arrangement whereby the Exchange receives a fixed sum from the Telegraph Companies and they collect from the subscribers and retain amounts covering both the price of the quotations and charges for transmission and also receive and submit to the Exchange for its approval or disapproval applications of would be subscribers. Until the Commission has passed upon the propriety of the entire arrangement, including the essential feature of it restricting the delivery of quotations to applicants approved by the Exchange, no other tribunal has jurisdiction in the matter.

*Baltimore & Ohio R. R. Co.* vs. *Pitcairn Coal Co.*, 215 U. S. 481;

*Morrisdale Coal Co.* vs. *Pennsylvania R. R. Co.*, 230 U. S. 304;

*Robinson* vs. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506;

*Texas Pac. R. Co.* vs. *Abilene Co.*, 204 U. S. 426.

The effect of the Act to regulate interstate commerce and the various amendments thereto is to take away from the states all power to regulate

matters placed under the supervision of the Interstate Commerce Commission even if in the absence of such legislation such matters would be subject to regulation by the states as affecting interstate commerce only incidentally.

*Adams Express Co.* vs. *Croninger*, 226 U. S. 491;

*Atchison, Topeka & Santa Fe R. R. Co.* vs. *Robinson*, 233 U. S. 173;

*St. Louis, Iron Mountain & Southern Ry. Co.* vs. *Edwards*, 227 U. S. 265;

*Boston & Maine R. R. Co. vs. Hooker*, 233 U. S. 97;

*Erie R. R. Co.* vs. *People of the State of New York*, 233 U. S. 671;

*Southern Railway Co.* vs. *Reid*, 222 U. S. 424.

The extension of the Interstate Commerce Act to telegraph companies by the amendment of 1910 took away from the states such power to regulate the interstate traffic of such companies as they had previously been free to exercise.

*Gardner* vs. *Western Union Telegraph Co.*, 231 Fed. Rep. 405 (Circuit Court of Appeals for the Eighth Circuit petition for *certiorari* denied by the U. S. Supreme Court, 243 U. S. 644);

*Williams* vs. *Western Union Telegraph Co.*, 203 Fed. 140;

*W. N. White* vs. *Western Union Telegraph Co.*, 33 I. C. C. 500;

*Cultra* vs. *Western Union Telegraph Co.*, 44 I. C. C. 670;

*Western Union Telegraph Co.* vs. *Dant*, District of Columbia, 42 App. Cas. 398.

The case of the *Western Union Telegraph Company against E. A. Bilisoly,* 116 Va. 562, was a suit by the addressee of a message for a statutory penalty on account of the delay in the delivery of a night letter. In this case the Supreme Court of Appeals said:

> "By an act of Congress approved June 18, 1910, telegraph companies, so far as interstate business is concerned, have been placed under the direct supervision of the Interstate Commerce Commission, and are subject, so far as applicable, to the same rules, regulations, restrictions and penalties that are imposed upon common carriers. This act has occupied the entire field and taken complete control of the regulation of telegraph companies, and while it has impliedly exempted them from any penalty for negligence it has provided a severe maximum penalty for intentional discrimination. Before the passage of this act there had been no legislation by Congress affecting or conflicting with the state statutes imposing a penalty for failure to deliver messages promptly, and therefore the state statutes affecting telegraph companies were upheld, even as to interstate messages, upon the ground that until Congress had legislated upon the subject-matter of telegraph companies, the state statutes were applicable. James Case, 162 U. S. 650 (16 Sup. Ct. 934, 40 L. Ed. 1105); Commercial Milling Co. Case, 218 U. S. 406 (31 Sup. Ct. 59, 43 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815); Crovo Case, 220 U. S. 364 (31 Sup. Ct. 399, 55 L. Ed. 498) and others. * * * It would be inconvenient as well as unnecessary to recite the detailed provisions of the act of Congress, approved June 18, 1910. It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the state statute imposing a penalty for failure to make prompt de-

livery can no longer be invoked in such cases. The act of Congress has ousted the state of jurisdiction over the subject."

See also

*Western Union Telegraph Company* vs. *First National Bank of Berryville*, 116 Va. 1009;

*Boyce* vs. *Western Union Telegraph Company*, 119 Va. 14.

See also the following cases:

*Western Union Tel. Co.* vs. *Compton*, 114 Ark. 193;

*Western Union Tel. Co.* vs. *Culpepper*, 120 Ark. 319.

*Bailey* vs. *Western Union Tel. Co.*, 97 Kan. 619; 156 Pac. 716; affd. on rehearing, 99 Kan. 7;

*Western Union Tel. Co.* vs. *Lee*, 174 Ky. 210;

*Haskell Implement Co.* vs. *Postal Telegraph Cable Co.*, 114 Me. 277;

*Western Union Tel. Co.* vs. *Bassett*, 111 Miss. 468;

*Western Union Tel. Co.* vs. *Showers*, 112 Miss. 411;

*Meadows* vs. *Postal Telegraph-Cable Co.*, 132 N. Car. 40;

*Strauss Gas Iron Co.* vs. *Western Union Tel. Co.*, 23 Pa. Dist. R. (Phil.) 291; affd. 59 Pa. Super. Ct. 122.

## POINT III.

**The order of the Public Service Commission cannot be sustained as directed towards the protection of Foster in the enjoyment of a common law right for the enforcement of which the jurisdiction of the Interstate Commerce Commission is not exclusive.**

The argument that the order of the Public Service Commission merely protects Foster in the enjoyment of a common law right and does not deal with any matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission is based upon the theory that the Telegraph Companies in supplying as well as in transmitting the quotations to those to whom they are supplied are engaged in a public business and must supply them to all alike without discrimination; that the Exchange in furnishing its quotations to the Telegraph Companies for use in such public business subjects them to such use as may be necessary to the full performance by the Telegraph Companies of their obligations to the public and that the provisions of the contracts between the Exchange and the Telegraph Companies requiring the Telegraph Companies to furnish the quotations only to such persons as are approved by the Exchange are incompatible with the purpose for which they are furnished to the Telegraph Companies and therefore void *ab initio* as a matter of law. If the order of the Public Service Commission merely enforces Foster's common law right, *Pennsylvania R. R. Co.* vs. *Puritan Coal Co.*, 237 U. S. 121, and

*Illinois Central R. R. Co.* vs. *Mulberry Coal Co.*, 238 U. S. 275, and similar cases may be cited to show that the jurisdiction of the Interstate Commerce Commission is not exclusive.

The theory underlining the argument is derived from two lines of cases: *State of Missouri ex rel. Baltimore & Ohio Telegraph Company* vs. *Bell Telephone Company*, 23 Fed. Rep. 539, is typical of the first group.

This case and other like cases merely hold that property, for example, patent rights used by a public service corporation in the performance of its public functions, must be used by it in conformity to its obligation to serve the public without discrimination. They do not impose on the carriers additional public functions but deal only with the manner in which they shall perform the public functions unquestionably resting on them. A situation would arise that would illustrate the principle of these cases if a lease were made to a railroad company for a right of way subject to the condition that the property of particular people should not be carried over it. The other line of cases include *Smith* vs. *Gold & Stock Telegraph Co.*, 42 Hun, 454; *Friedman* vs. *Gold & Stock Telegraph Company*, 32 Hun, 4; *Shepard* vs. *Gold & Stock Telegraph Co.*, 38 Hun, 338. These all arose prior to 1892 at a time when the Telegraph Companies were permitted to go upon the floor of the Exchange and collect quotations for distribution. The principle upon which they proceeded appears most clearly in *Smith* vs. *Gold & Stock Telegraph Co.*, 42 Hun, 454. The Court there held that the Telegraph Company was under no obligation to engage in the business of collecting quotations for distribution to the public, but that so long as it engaged in that business

it had to serve all alike; that a condition in its contract with subscribers permitting it to discontinue the service whenever in its judgment a breach of condition had occurred was not a reasonable regulation and afforded no defense to an action by a subscriber to enjoin it from discontinuing the service to him. The argument that the order of the Public Service Commission only enforces a common law right of Foster assumes that under the contracts between the Telegraph Companies and the Exchange the Telegraph Companies purchase the quotations for use in a public business; that the purchase of quotations puts them in the same position as though they had collected them and that under the doctrine of the Baltimore & Ohio Telegraph Company case the limitations in the contract between the Exchange and the Telegraph Companies are ineffective and that under the doctrine of the New York cases the quotations must be delivered to all alike.

The answer to the argument that has been outlined is that the Telegraph Companies do not undertake to supply quotations to the public. The only public functions they perform with respect to them is the transmission of them. They, as they had a right to do, retired from the public business of supplying quotations (if indeed they were ever in such business) when they were excluded from the floor of the Exchange and entered into contracts with the Exchange under which they received the quotations for transmission to such subscribers only as the Exchange approves. The theory that a business not itself charged with a public interest, such as the business of supplying lumber, coal, milk or quotations, becomes charged with a public interest if a common carrier engages in it is of very doubtful validity even if limited to the cases in which the

carrier holds itself out as ready to serve the public generally. The character of the business, not the character of the person engaged in it, should, it would seem, determine whether it is charged with a public interest. But whether or not the theory is sound if so limited, it certainly has no application if the carrier does not hold itself out as engaged in the business of supplying the public generally. It may sell lumber, coal or supply quotations to select persons, without rendering itself liable to do the like for any one who may apply to it. The Telegraph Companies do not, and under their contracts with the Exchange, cannot hold themselves out as engaged in supplying quotations to the public. As they are not engaged in the public business of supplying quotations, the Exchange in delivering quotations to them does not subject such quotations to the incidents of a public business. The doctrine of each of the lines of cases on which the argument precedes is therefore inapplicable.

*Matter of Renville,* 46 App. Div. 37, dealt with the condition of things that existed after the Western Union Telegraph Company was excluded from the floor of the Exchange and when it was receiving the quotations under a contract (Exhibit A annexed to the answer of the Western Union Telegraph Company to Foster's complaint) which provided that it should not contract to furnish tickers to any person, firm, corporation or organization in New York City not already having its instruments until the application of such firm, corporation or organization should have been submitted to and approved by at least three members of the Committee on Arrangements of the Stock Exchange and that as its existing contracts with parties in New York City should expire from time

to time they should not be renewed until the applications for renewals should have been in like manner approved. Renville, whose application had not been approved by the Stock Exchange, sought by *mandamus* to compel the Telegraph Company to furnish him quotations. The Appellate Division in affirming the decision of the Court below denying Renville's application said (pp. 43, 44):

> "This private voluntary association, being thus in control of its own property, and having the absolute right to give information as to the dealings of its members with each other to whom it pleases, and upon such conditions as it pleases to impose, gives certain information to the defendants to be delivered to certain specified persons, and upon such condition that the defendants give such information to such specified individuals and none other. The appellant, being one of those to whom the Stock Exchange refused to allow the information furnished by it to the telegraph company to be transmitted, asked the court, by mandamus, to compel the telegraph company to violate the conditions upon which such information had been received by it, and to furnish such information to him.
>
> We fail to see any principle upon which this application could be granted. It may be conceded that the respondents are corporations charged with the performance of public duties, are under the control of the Legislature, and may be compelled by mandamus to perform their obligations to the public. The obligation that they assume is to receive and transmit communications. No statute requires a telegraph company to communicate to the public despatches which it has received from certain individuals to be transmitted to specified persons; on the contrary, such a communication is prohibited. I cannot see

that it makes any difference whether a despatch is given to a telegraph company to be communicated to a single individual, or to be communicated to ten, a hundred or a thousand individuals. Under this agreement between the Stock Exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the Stock Exchange. Whether we call this information a special despatch or general information which the Stock Exchange desires to communicate, seems to me to be entirely immaterial. The fact that the telegraph company pays to the Stock Exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the Stock Exchange are willing to pay the Stock Exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the Stock Exchange wishes to transmit to the persons it designates and to no one else. I can see no reason why the Stock Exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the Stock Exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the Stock Exchange for a specific purpose and none other.

An entirely different question was presented when the respondents procured the information themselves, and furnished such information to the public. It may be that, under such circumstances, the respondents were

bound to furnish the information thus collected to all persons who were willing to comply with the conditions imposed by the respondents as a condition for rendering the services. There can be no doubt of the fact that the appellant could require the respondents to transmit any communication sent to him from others, or that he wished to send to others; and if the Stock Exchange desired to communicate to him information as to the dealings between its members, there could be no doubt of the duty of the respondents to comply with such request. But until the Stock Exchange consents to the appellant receiving such information as it supplies to the telegraph company for transmission, I cannot see that the court has the right to compel the Stock Exchange to furnish such information to the appellant."

The question presented by the Renville case is the same as that here under consideration. The defendants urge that its authority is weakened by the decision in *Tucker* vs. *Western Union Telegraph Company and others* decided in June, 1915, 158 N. Y. Supp. 959. The decision in the Tucker case was rendered upon an application by the defendants to vacate temporary injunctions theretofore granted restraining the Telegraph Companies from discontinuing the ticker service to Tucker and four other plaintiffs. The only point determined was that the injunctions should be continued until the hearing and determination of the actions. The Judge at Special Term in his opinion said that "the conclusion reached here does not conflict with the law in the Renville case applied under then existing conditions", the distinction being that the decision in the Renville case was made in 1899 "before tele-

graph companies were brought within the Public Service Commission Law". So far as the decision of the Special Term was based on the provisions of the Public Service Commission Law of New York it has no bearing upon the common law rights of Tucker. The fact is, however, that the correctness of the views expressed by the Judge at Special Term were not passed upon by the Appellate Division which affirmed the order denying the motion to vacate the temporary injunction with the following memorandum:

> "Held, that a case was presented by the papers warranting the granting of the temporary injunction and that in view of the disposition of the appeal now made by this Court it is not necessary to pass further upon the question sought to be presented therein" (171 A. D. 965).

The papers on which the temporary injunctions were granted were the complaint and affidavits of the plaintiffs in the five actions. The questions raised by the answers of the defendants were left by the Appellate Division to be passed upon on the trial. The actions were never brought to trial and were either discontinued or dismissed after the Western Union Telegraph Company had with great difficulty obtained legal evidence to establish the notorious fact that the plaintiffs were bucketshop keepers, and the bucketshop business in the United States had been carried on for many months on the basis of the quotations supplied under the injunctions.

The views expressed by the Court in the Renville case are sound and dispose of the contention that Foster's application to the Public Service Commis-

sion was for the enforcement of a common law right.

The terms and the evident purpose of the contracts between the Exchange and the Telegraph Companies show that the quotations are not furnished to the Telegraph Companies to be used in the business of supplying them to the public but solely in order that they may be transmitted to subscribers already approved by the Exchange. The continuing interest of the Exchange in the quotations after their delivery to the Telegraph Company is recognized in almost every paragraph of the contracts. They are furnished to the subscribers only for the use of the subscribers themselves on their own premises and for the purpose of their own business. The subscribers may not communicate them to others unless the persons to whom they are communicated have been approved by the Exchange and have signed contracts putting the same limitations upon the use of them to which they are subject in the hands of the subscribers. The Exchange reserves the right under the contracts signed by the subscribers and all persons to whom the quotations are communicated by subscribers with the consent of the Exchange to have access to the offices where the quotations are used and to observe the use made of them. Most careful and minute provision is made to guard against the Telegraph Companies delivering the quotations to anybody or anybody's obtaining them from the Telegraph Companies except subscribers approved by the Exchange, and they are to get them only through the channels and in the manner specified in the contracts. The Exchange reserves the right to make similar contracts for the distribution of the quotations with other telegraph companies. It may step in and take

charge of any litigation affecting the control or disposition of the quotations. All of these provisions necessarily imply that the quotations are delivered to the Telegraph Companies for transmission only.

The Supreme Judicial Court attaches great significance to the fact that the Telegraph Companies pay to the Exchange a lump sum and regards this as indicating that the contracts between the Telegraph Companies and the Exchange effect a kind of sale giving the Telegraph Companies a sort of property right in the quotations. The scheme of payment is simply one of convenience. The subscribers might be charged one sum for the quotations to be remitted to the Exchange and a separate sum for the transmission of the quotations to be retained by the Telegraph Companies, or both sums might be united and remitted to the Exchange and then divided. The parties prefer the present arrangement. If it is open to any objection under the Interstate Commerce Law as an improper classification or practice the remedy must be sought before the Interstate Commerce Commission.

The Supreme Judicial Court of Massachusetts lays particular stress upon the provision of the contract between the Exchange and the Telegraph Company which reads as follows:

> "It is understood and agreed that as to the right of the Exchange hereinbefore specified to disapprove applicants for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations."

It is assumed that this implies that the quotations are furnished to the Telegraph Companies for dis-

tribution to the public generally, subject only to the limitation that they shall not be furnished for illegal purposes. The object of the clause is merely to furnish some assurance to the Telegraph Companies that the entire consideration for their payments to the Exchange will not be taken away through the exercise of its power to disapprove applications. The very reason for providing, as the contracts do, that continuous quotations shall be sent only to applicants approved by the Exchange, was that the common law rule allowing, and indeed requiring, public service corporations to refuse their services to people wanting them for illegal purposes was wholly insufficient to prevent the continuous quotations from getting into the hands of such persons. The contracts between the Exchange and the Western Union Telegraph Company which were in force between 1892 and 1914 (see Exhibits A and B annexed to the answer of the Western Union Telegraph Company to Foster's complaint) permitted the Telegraph Companies to furnish the quotations to anybody outside of the City of New York except to persons directly or indirectly engaged in the promotion or maintenance of bucketshops. The practical effect of these contracts was that the Western Union had to furnish ticker service to all applicants outside of the City of New York unless it was in a position to show that they were concerned in the promotion or maintenance of bucketshops. As legal evidence of the facts is obtainable only with the greatest difficulty and much time was necessary to get it (as illustrated in the Tucker cases referred to above) every bucketshop keeper could get quotations either directly or indirectly and the bucketshop business based on the quotations of the Exchange flourished practically

without restriction. To meet this situation the present contracts deny to the Telegraph Companies the right to furnish the quotations to the public generally and permit them to be furnished only to persons previously approved by the Exchange. The Exchange reserves to itself the absolute power of determining whether or not applicants are persons who can be safely entrusted with the quotations. The only effect of the provision of the contract dwelt upon by the Supreme Judicial Court is to require the Exchange to exercise good faith in its dealings with the Telegraph Companies so as not unduly to cut down the receipts to be derived by the Telegraph Companies from the contracts. The Exchange is the judge and the sole judge as to whether applicants can safely be entrusted with the quotations. The contracts instead of authorizing the delivery of the quotations to the public generally, subject to the limitation that they shall not be delivered to persons desiring them for bucket-shop purposes, denies the Telegraph Companies the right to deliver the quotations to any one except subscribers who have been approved by the Exchange in its discretion as persons to whom the quotations may be safely entrusted.

The Supreme Judicial Court says in its opinion: "It cannot be contended on this record that that (*i. e.*, the purpose of preventing the illegal use of the information) is the real ground of the refusal of the Stock Exchange to approve the application of Foster." If it were true that that was not the ground of the refusal, the Telegraph Companies are the only people entitled to complain. But what basis is there for the statement of the Court? What other ground has been or can be suggested? What reason is there for assuming that the Exchange was

not acting in good faith? The Telegraph Companies, it is true, did not offer any evidence before the Commission to show that Foster was not a person to be entrusted with the quotations. That was a question for the Exchange, not for the Commission to decide. On the other hand, Foster shows in his complaint before the Public Service Commission that he was accorded a full hearing by the Committee of the Exchange authorized to pass upon the matter, and the extract from his testimony annexed to the notice from the Exchange to the United Telegram Company disapproving his application (which is made a part of the answer of the United Telegram Company) shows that the Committee had before it evidence amply sufficient to justify it in holding that he was not a person who could be safely trusted with the quotations. The record in this case shows, as does the record in the Tucker case, that the primary purpose of the contracts between the Exchange and the Telegraph Companies would be defeated by treating them as though they turned over the quotations to the Telegraph Companies for general distribution subject to limitations no broader than those imposed by law.

The decisions of this Court in *Board of Trade* vs. *Christie,* 198 U. S. 236, and *Hunt* vs. *New York Cotton Exchange,* 205 U. S. 322, are inconsistent with the claim that a member of the public has a common law right to obtain quotations distributed under contracts similar to that between the Telegraph Companies and the Exchange. In the Christie case the Board of Trade failed to prove that the defendant kept a bucketshop. The defendant, however, was enjoined from obtaining the quotations except through the channels and subject to the con-

ditions prescribed in the contract between the Board of Trade and the Telegraph Company. In the Hunt case the defendant was obtaining the quotations from the Telegraph Company under an injunction from a state court. The Cotton Exchange sued in the Federal Courts to enjoin him from obtaining and using the quotations. This Court sustained the injunction granted by the Circuit Court on the ground that although the plaintiff was not obtaining the quotations surreptitiously he was getting them from a person, *i. e.*, the Telegraph Company, forbidden to communicate them. If he had a common law right to get the quotations from the Telegraph Company the prohibition was ineffective. This Court in sustaining the validity of the prohibition necessarily denied the claim of common law right.

## POINT IV.

**The order of the Public Service Commission deprives the plaintiffs in error of their property without due process of law.**

The quotations collected by the Exchange are its private property which it may communicate to some and withhold from others and may surround with such restrictions regarding the use to be made of them by those to whom they are communicated as it sees fit.

*Board of Trade* vs. *Christie*, 198 U. S. 236;
*Hunt* vs. *Cotton Exchange*, 205 U. S. 322;
*Matter of Renville*, 46 N. Y. App. Div. 37.

The Telegraph Companies receive the quotations only upon the terms and conditions and subject to the limitations as to what shall be done with them set out in the contracts with the Exchange. If they deliver the quotations to any one contrary to the terms of the contracts, the Exchange has of course the right immediately to cancel the contracts, thereby subjecting the Telegraph Companies not only to the loss of the profits to be anticipated from the contracts but to liability to suit by subscribers to whom they have agreed to furnish the quotations and also to suit by the Exchange. (*Hunt* vs. *N. Y. Cotton Exchange,* 205 U. S. 322.) The order of the Public Service Commission requires the Telegraph Companies to deliver the quotations contrary to the terms of the contracts. The result of the enforcement of the order may be either that the Exchange will cancel the contracts subjecting the Telegraph Companies to the losses and liabilities above indicated or will insist that the Telegraph Companies shall cease to furnish quotations to Massachusetts subscribers, thereby depriving them of all revenue from such subscribers. If the Exchange does not take either of these courses the Telegraph Companies will still be liable to it for delivering the quotations in violation of the terms on which they receive them.

The order of the Public Service Commission attempts to subject private property to public use. The property to be affected is that of the New York Stock Exchange which it may if it chooses keep out of the reach of the Massachusetts authorities. But the consequences to the Telegraph Companies of the enforcement of the order and their special interest in the quotations if entrusted to them are such as to entitle them to invoke the pro-

tection of the provisions of the Constitution not only in behalf of the Exchange but also in their own behalf.

The order of the Public Service Commission; in that it attempts to subject to public use private property that has not been dedicated to such use, attempts to take private property without due process of law.

In *C. B. & Q. Railroad Co.* vs. *Illinois,* 200 U. S. 561, Mr. Justice Harlan said (p. 593):

> "The Constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power."

In *Forster* vs. *Scott,* 136 N. Y. 577, the Court of Appeals of New York said (p. 584):

> "It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

In *Weems Steamboat Co.* vs. *Peoples Co.,* 214 U. S. 345, 355, Mr. Justice Peckham said:

> "A private wharf or a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use, due compensation must be made. The owner of a private wharf on a navigable stream does not on that account only, hold it by a different title from the owner of any other property which he may

use himself or permit others whom he may select to use, while at the same time denying its use by any one else."

In *Louisville and Nashville R. R. Co.* vs. *West Coast N. S. Co.*, 198 U. S. 483, a similar question arose as to the rights of the owners of a private wharf to refuse to permit competitors to use the wharf.

At page 495 Mr. Justice Peckham said:

> "We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation."

In *L. & N. R. Co.*, vs. *Central Stock Yards Co.*, 212 U. S. 132, it was held that a provision of the constitution of the State of Kentucky which was construed by the State Court to require a common carrier railroad to deliver its cars to connecting carriers, without providing adequate protection for their return or compensation for their use, amounted to a taking of property without due process of law under the Fourteenth Amendment.

*Oregon R. R. & N. Co.* vs. *Fairchild*, 224 U. S. 510, 523, involved the constitutionality of a State statute authorizing a State Railroad Commission to order railroad companies at their own cost to lay additional trackage or to make additional connections.

Mr. Justice Lamar, at page 523, says:

> "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid."

*Missouri Pacific Railway* vs. *Nebraska*, 217 U. S. 196, 205, involving the constitutionality of a State statute requiring railroad companies to make switch connections with grain elevators near any railroad station upon application of the owner of the elevator.

At page 205, Mr. Justice Holmes said:

> "To require the Company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay."

The jurisdiction of the Massachusetts Public Service Commission covers:

> "The transmission of intelligence within the Commonwealth by electricity, by means of telephone or telegraph wires or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment or appertaining thereto" (Section 2, C. 784 of the Acts of 1913).

The duties of Telegraph Companies are defined by Chapter 122 of the Revised Laws, Section 9, as follows:

> "A Telegraph Company shall receive dispatches from or for other Telegraph Companies and associations, and from and for any person; and, upon payment of the usual charges

for transmitting dispatches according to the regulations of the Company, shall transmit them faithfully and impartially."

The Commission is therefore wholly without jurisdiction over the interstate transmission of intelligence and is not authorized to adjudicate any claims asserted in respect thereto, even if such claims do not come within the exclusive jurisdiction of the Interstate Commerce Commission nor has it jurisdiction over intelligence transmitted except so far as relates to the transmission (including of course the receipt and delivery) thereof. *It has no power to pass upon claims to the ownership of or to rights in respect to such intelligence.*

The order here is based upon an adjudication of a claim to rights in respect to intelligence transmitted in interstate commerce. The adjudication is not due process of law; the order takes property without due process of law.

## POINT V.

**The decrees of the Supreme Judicial Court of Massachusetts should be reversed and the order of the Public Service Commission held to be null and void.**

RUSH TAGGART,
JOHN G. MILBURN,
ARTHUR LORD,
Counsel for Plaintiffs in Error.

# In the Supreme Court of the United States.

| | |
|---|---|
| WESTERN UNION TELEGRAPH COMPANY and UNITED TELEGRAM COMPANY, Plaintiffs in error, against FREDERICK J. MACLEOD, *et al.*, as Members of the Public Service Commission of the Commonwealth of Massachusetts and CALVIN H. FOSTER, Defendants in error. | October Term, No. 680. No. 681. |

## BRIEF FOR PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM.

### Statement.

In the fall of 1914 contracts were entered into between the New York Stock Exchange and the Western Union Telegraph Company and between the New York Stock Exchange and the United Telegram Company which are set out in full in the record, pages 40-56. They relate to quotations collected on the floor of the Exchange by its employees and are similar to the contract between the Chicago Board of Trade and the Telegraph Companies which are under consideration in *Board of Trade* v. *Christie*, 198 U. S. 236, and the New York Cotton Exchange contract which was under consideration in *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322. In the Western Union con-

tract the Exchange agrees at its own expense to furnish to the Telegraph Company under the limitations, conditions and restrictions in the contract prescribed "full and continuous quotations and prices made in transactions upon the Exchange" (Record, page 41). Detail provision is made for the quotations and the delivery of them to the Telegraph Company, and it is provided:

> "That neither said quotations nor any part thereof nor any information therein contained shall be furnished by the Telegraph Company or its employees to any person or in any manner except as herein provided" (Record, page 42).

The Fourth clause of the contract is in part as follows (see Record, page 43):

> "The Telegraph Company may furnish said quotations to any person whether a member of the Exchange or not anywhere in the United States or Canada outside of that portion of the Borough of Manhattan lying south of Chambers Street, and may also furnish the same by ticker to any person who is not a member of the Exchange and to each Director of the Telegraph Company who is also a member of the Exchange at his or their office or offices in the Borough of Manhattan south of Chambers Street, provided, however, that the Telegraph Company shall not after the first day of November, 1914, furnish quotations by ticker or otherwise in the volume of a continuous service which is defined to be oftener than at intervals of fifteen minutes (and is herein referred to as continuous quotations) to any subscriber therefor unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company and the subscriber shall have been approved by the Exchange, the said applica-

tion to be substantially as follows:" (Here follows the form of application.)

"Whereby the applicant agrees to use the quotations only in his own business and not to furnish them to anyone unless he has been approved by the Exchange and has signed a similar agreement. One of the applications when signed must be delivered to the Exchange and the application is not effective for any purpose until approved by it."

The Telegraph Company is permitted to furnish any of the quotations to its patrons at intervals of more than fifteen minutes without requiring them to sign the prescribed form of application, but the Telegraph Company is required to furnish the Exchange monthly a list of such patrons and to discontinue the service to any of them to whom the Exchange may object. The Telegraph Company agrees to pay to the Exchange at the rate of Fifty thousand dollars per annum during the continuance of the agreement in equal monthly installments (Record, page 45). It is declared that:

"As to the right of the Exchange hereinbefore specified to disapprove applications for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations" (Record, page 47).

The contract with the United Telegram Company is very much the same except that the quotations instead of being delivered to the United Telegram Company in the Stock Exchange building are furnished to it at the office of the Postal Telegraph Company in New York, and it is permitted to furnish such quotations only to subscribers in the City of Boston and pays the Exchange only $9,000 a year (Record, pages 51-55).

After November 1st, 1914, Calvin H. Foster made application to the Western Union Telegraph Company and also to the United Telegram Company for New York Stock Exchange quotations, but in each case the Stock Exchange refused to approve his application and he failed to obtain the quotations (Record, page 8). Thereafter he filed his complaint before the Public Service Commission of Massachusetts (Record, page 20) and the Western Union Telegraph Company and the United Telegram Company respectively filed answers thereto. The answers of the Telegraph Companies (Record, page 21 and page 48) set up their contracts with the New York Stock Exchange and the fact that the Stock Exchange had declined to approve Foster's application for quotations. Each answer set up that an order by the Public Service Commission compelling it to furnish the quotations to Foster would require it to appropriate the property of the New York Stock Exchange for Foster's benefit and would result in the destruction of respondent's contract with the Exchange contrary to the provisions of the Federal Constitution in that it would thereby be deprived of its property without due process of law. Each answer asked that the complaint be dismissed,

1. For the reason that the Commission was without jurisdiction over the matters stated in the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission, and

2. For the reason that upon the facts stated the respondent had no legal right to render the services demanded by complainant in view of its contract with the New York Stock Exchange (Record, pages 24 and 50).

The matter was heard by the Public Service Commission on Foster's complaint and the answers of the Telegraph Companies folio 7), and the Commission held that the Telegraph Companies

had without just cause denied and refused to supply to Foster the continuous quotations of the New York Stock Exchange and that such denial was an unjust and unlawful discrimination and they were ordered forthwith to remove such discrimination.

The two Telegraph Companies in the bill filed by them in the Supreme Judicial Court of Massachusetts to annul the order of the Public Service Commission alleged that said order is unlawful for the following reasons, among others * * *:

> B. "That the Public Service Commission is without jurisdiction over the subject matters of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress, the said Public Service Commission therefore had no jurisdiction to enter the order complained of.
>
> C. That upon the facts stated in the answer of the Western Union Telegraph Company and the United Telegram Company and in said report of the Public Service Commision neither the Western Union Telegraph Company nor said United Telegram Company has the legal right to render the service demanded by the complainant and now required by said order complained of in view of their contracts with said New York Stock Exchange set forth in their said answers.
>
> * * * * * * * *
>
> E. That your complainant, the Western Union Telegraph Company and the United Telegram Company, would be required in order to comply with such order to appropriate the property of said New York Stock Exchange for the benefit of said Foster and thereby destroy their valuable contracts with said Exchange contrary to the Provisions of the Federal Constitution in that your petitioners would thereby be deprived of their property without due process of law" (Record, pages 6, 61-62).

The two Telegraph Companies in their answer to the bill filed by the Public Service Commission of Massachusetts to enforce the order of the Public Service Commission set up as reasons for the unlawfulness and invalidity of the said order the same matters alleged by them in their bill of complaint.

Both suits were heard on bill and answer, no testimony being taken in either case. The Supreme Judicial Court of Massachusetts held:

> "That the condition in the contracts between the Telegraph Companies and the Stock Exchange whereby the attempt is made to list the persons among law abiding citizens to whom the quotations may be delivered cannot stand against regulation by a public authority to insure indiscriminate distribution." (See Record, page 70.)

and further held that the order of the Public Service Commission was within its jurisdiction and a proper regulation. It held that the furnishing of quotations was a service connected with "the transmission of intelligence within the Commonwealth by electricity" within the meaning of Section II of Chapter 784 of the Acts of Massachusetts of 1913 conferring jurisdiction upon the Public Service Commission.

The Court further held that:

> "The transactions disclosed in this Record as having been dealt with by the Public Service Commission in our opinion did not constitute Interstate Commerce * * * the sending of the quotations from New York to Boston over wires in the ordinary course of telegraphy manifestly was Interstate Commerce, but, as has been pointed out, the Telegraph Company as to their ticker service sent no messages from New York to the individual ticker subscribers. The quotations as messages were sent by the Morse

> Code from New York to the Telegraph Companies at their Boston offices. The quotations there were transferred by their own employees to instruments of a different character. By the ticker service the information was delivered to their patrons in Boston. * * * The interstate transmission ended when the quotations reached the Boston offices. The subsequent acts in delivering the information upon the tickers in the offices of its customers were new and independent transactions."

The Court further held:

> "The Federal Interstate Commerce Act does not appear to us to apply to the transaction here in question. That Act relates to the transmission of messages by telegraph in interstate commerce. * * * The Act of Congress here in question does not cover the local delivery by ticker service radiating from Boston offices, to patrons in that City of each of the Telegraph Companies, of information bought by the Telegraph Companies and received in Interstate Commerce but delivered in intrastate commerce under the circumstances disclosed in the cases at bar."

The Writ of Error was allowed by Judge Rugg of the Supreme Judicial Court who wrote the opinion of the Court. The Assignment of Errors is as follows:

> "1. That the Public Service Commission is without jurisdiction over the subject matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress, and said Public Service Commission, therefore, had no jurisdiction to enter the order complained of.
>
> 2. In that said Court did erroneously rule and decided against the prayer of the

plaintiffs in error that the Public Service Commission had jurisdiction over the subject matter of the complaint set forth in said petition, and that the same was not within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress, and that said Public Service Commission, therefore, had jurisdiction to enter the order complained of.

3. In that said Court erroneously refused to rule, as requested in the answer of said plaintiffs in error, that said plaintiffs, The Western Union Telegraph Company and the United Telegram Company, would be required, in order to comply with said order, to wit, the order of the Public Service Commission of Massachusetts, to appropriate the property of said New York Stock Exchange for the benefit of said Foster, and thereby destroy their valuable contracts with said Exchange, contrary to the provisions of the Federal Constitution, in that your petitioners would thereby be deprived of their property without due process of law.

4. In that said Court did erroneously rule and decide that your petitioners, The Western Union Telegraph Company and the United Telegram Company, would not be required, in order to comply with said order, to appropriate the property of said New York Stock Exchange, for the benefit of said Foster, contrary to the provisions of the Federal Constitution, and that your petitioners would not thereby be deprived of their property by due process of law."

The contention of the defendant in error Calvin H. Foster is that no Federal question is presented by the writ of error.

He claims that the basis of the decision which plaintiff in error seeks to review is the construction put by the Public Service Commission and the Supreme Judicial Court of Massachusetts upon the contracts between the Exchange and the Tele-

graph Companies and findings of fact made by the Commission and Court.

The points of the plaintiffs in error are as follows:

## POINT I.

**There was no question of fact before the Pubilc Service Commission or the Supreme Judicial Court of Massachusetts. They held as a matter of law that transactions did not constitute interstate commerce which plaintiffs in error contend were interstate commerce.**

## POINT II.

**The Public Service Commission and the Supreme Judicial Court held that the jurisdiction of the Interstate Commerce Commission did not extend to transactions which plaintiffs in error contend were within its sole jurisdiction.**

## POINT III.

**The decision sought to be reviewed does not rest upon a construction of the contracts between the Exchange and the Telegraph Companies but upon the ground that the Public Service Commission might lawfully require the Telegraph Companies to furnish quotations contrary to the provisions of those contracts.**

## POINT IV.

**The questions presented by the Writ of Error are grave and far reaching in importance and call for full and extended argument and consideration.**

---

## POINTS.

**POINT I. There was no question of fact before the Public Service Commission or the Supreme Judicial Court of Massachusetts. They held as a matter of law that transactions did not constitute interstate commerce which plaintiffs in error contend were interstate commerce.**

No question of fact has arisen regarding the receipt, transmission or distribution of the Stock Exchange quotations. They are transmitted from New York to Boston over Morse wire and there immediately relayed to the tickers in the offices of the various subscribers where they are printed on the tape in letters and numerals. The subscribers in Boston who obtain quotations from the Telegraph Companies have necessarily in all cases made their arrangements for such quotations before the Telegraph Companies receive them in New York. Such contracts were for the transmission of the quotations from New York to Boston, and their delivery there to the subscriber. They are received in New York and transmitted to Boston for the purpose of carrying out such arrangements with the subscribers. The Public Service Commission and the Supreme Judicial Court of Massachusetts

in holding that the Interstate transmission of the quotations ended at the Boston offices of the Companies and that their distribution to subscribers was a new and independent transaction necessarily had to pass upon the scope and extent of Interstate Commerce. The sole question was whether Interstate Commerce did or did not extend beyond the arrival of the quotations at Boston. The plaintiffs in error contended that it did and the Public Service Commission and the Supreme Judicial Court held that it did not. In so holding they necessarily decided a federal question contrary to the contention of the plaintiff in error.

**POINT II. The Public Service Commission and the Supreme Judicial Court held that the jurisdiction of the Interstate Commerce Commission did not extend to transactions which plaintiffs in error contend were within its sole jurisdiction.**

The Public Service Commission and the Supreme Judicial Court expressly held that the Interstate Commerce Act does not apply to the distribution of quotations from Boston. In so doing they of course decided a federal question as to the scope and extent of the Interstate Commerce Act. Defendant in error argues that the jurisdiction of the Interstate Commerce Commission over telegraph companies is limited to an enforcement of their obligations to the public in their capacity as carriers of messages, and that in distributing quotations in Boston they do not act in their capacity as such common carriers. In answer to this argument it is enough to say that the question whether the jurisdiction of the Interstate Commerce Com-

mission is thus limited or is not thus limited is necessarily a federal question.

**POINT III. The decision sought to be reviewed does not rest upon a construction of the contracts between the Exchange and the Telegraph Companies but upon the ground that the Public Service Commission might lawfully require the Telegraph Companies to furnish quotations contrary to the provisions of those contracts.**

The contracts between the Telegraph Companies and the Exchange leaves little room for construction. They provide that the Exchange shall "furnish" to the Telegraph Companies continuous quotations and that such quotations shall not be "furnished" by the Telegraph Companies to any persons except as in the contracts provided and that they shall not be "furnished" to any subscriber unless he has been approved by the Exchange and has signed in duplicate the form of application prescribed. The Telegraph Company pays the Exchange a certain amount per month and retains for its own account what it charges the subscribers. According to one view the contracts in substance provide for the delivery of the quotations to the Telegraph Companies to be transmitted to persons previously approved by the Exchange so that the only relation of the Telegraph Company to the messages is that of carrier. The other view adopted by the Supreme Judicial Court of Massachusetts is that:

> "The transaction constitutes in effect a kind of sale of the quotations from the Stock Exchange to the Telegraph Company"

and the latter

> "acquires a kind of right in the quotations which has some of the incidents of property; the only limitations proposed to be expressed by the contract upon the absolute right of the Telegraph Company to deal with the contracts as its own are those tending to prevent the destruction of their value by being taken surreptitiously or otherwise, none of which are here in question, and that no one shall be furnished a ticker without the approval of the Stock Exchange for the single purpose of preventing the illegal use of information."

The Court did not, and in view of the decisions in *Board of Trade* v. *Christie*, 198 U. S. 236, and *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, could not question the continuing interest of the Stock Exchange in the quotations notwithstanding the *quasi* sale to the Telegraph Companies and re-sale by the Telegraph Companies to the subscribers. The validity of the provision restricting the re-sale to the case of applicants signing the form of application set out in the contract (see Record, page 43) is impliedly conceded and the limitations upon the use and communication of the quotations by subscribers is not denied. In other words, the view of the Massachusetts Court leaves the dominant ownership of the quotations in the Exchange but vests in the Telegraph Companies a sort of special property interest entitling them to grant to subscribers a limited right to use the quotations, subject, however, to the rights reserved by the Exchange as owner. So far the two views seem to be rather two different ways of picturing the relations created by the contracts than constructions of their provisions, but when it comes to the requirement that subscribers who have signed the form of application must, in order to obtain the

quotations, be approved by the Exchange, the Massachusetts Court declares this ineffective not as a matter of construction but because the condition in the contracts between the Telegraph Companies and the Stock Exchange "whereby the attempt is made to list the persons among law abiding citizens to whom the quotations may be delivered cannot stand against regulation by a public authority to insure indiscriminate distribution," and "the rights here in question arise under an attempted legislative regulation of the conduct of a Public Service corporation" and the Telegraph Companies are not exonerated from complying with an otherwise lawful order of the Public Service Commission by the terms of their several contracts with the Stock Exchange."

The plaintiffs in error contended before the Public Service Commission and before the Supreme Judicial Court of Massachusetts that to require them to furnish quotations in violation of the terms of their contracts with the Stock Exchange would deprive them of their property, to wit, their contracts with the Exchange without due process of law. The decision sought to be reviewed necessarily involves the rejection of this contention.

**POINT IV. The questions presented by the Writ of Error are grave and far reaching in importance and call for full and extended argument and consideration.**

A. The Chicago Board of Trade, in order to keep its quotations out of the hands of those liable to abuse them, while giving the use of them to those desiring them for legitimate purposes, devised the form of contract which is the basis of the contracts between the New York Stock Exchange and the

Telegraph Companies here in question. In *Board of Trade of the City of Chicago* against *Christie Grain & Stock Company,* 198 U. S. 236, the Board of Trade contract was under consideration and it was established that the quotations collected by the Board of Trade were property and entitled to the protection of the law and that it had the right to keep the work which it had done or paid for doing to itself and that it did not lose its rights by communicating the results to the Telegraph Companies to be transmitted only to persons approved by it and binding themselves not to make the information public. Thereafter the Cotton Exchange followed the example of the Board of Trade, and in *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, its right to enjoin the use of its quotations by anyone obtaining them contrary to the terms of its contracts with the Telegraph Companies was sustained. The Stock Exchange has now adopted the Board of Trade plan and this suit is an attack on its validity. If the quotations of the exchanges are to be furnished to applicants not approved by the exchanges contrary to the provisions of their contracts with the Telegraph Companies, the property rights of the Exchanges in their quotations established in the *Christie* case and the *Hunt* case will be illusory and their plans for preventing the abuse of quotations will break down. If anyone can get quotations unless it can be shown by legal evidence to the satisfaction of a Public Service Commission that he intends to use them for illegal purposes the attempt to keep them from getting into improper hands obviously will be futile.

B. The opinion in *Tucker* v. *Western Union Telegraph Company,* of which a copy is annexed to the brief of plaintiff in error, is referred to repeatedly in the opinion of the Public Service Commission and of the Supreme Judicial Court and is the

source of many of the views expressed in those opinions. The opinion was rendered upon a motion to set aside ex parte preliminary injunction orders in five cases in Erie County, New York. Appeals were taken to the Appellate Division of the Fourth Department from the orders denying the motions to vacate the preliminary injunctions and the orders were affirmed by the Appellate Division which, however, did not review the opinion of the lower court, it being held:

> "That a case was presented by the papers warranting the granting of a temporary injunction, and that in view of the disposition of the appeal now made by this Court it is not necessary to pass further upon the questions sought to be presented therein." 165 N. Y. Supplement, 1148.

None of the five cases were ever brought to trial and all have been discontinued or dismissed.

C. The distribution of the Stock Exchange quotations in Massachusetts is Interstate Commerce. This is equally true whether the Telegraph Company be regarded as a carrier entrusted by the Stock Exchange with the quotations for delivery to subscribers approved by it or whether it be considered that there is a kind of sale to the Telegraph Companies giving them a sort of property right in the quotations by virtue of which they sell to the subscribers.

On the first supposition the order of the Public Service Commission is a direct interference with an interstate carrier in the transmission of messages sent from New York for delivery in Massachusetts. On the second supposition the Telegraph Companies arrange with their subscribers to obtain the quotations in New York and deliver them in Massachusetts and receive and transmit the quotations for the purpose of carrying out the

obligations under these arrangements. Both as sellers and carriers they are engaged in Interstate Commerce. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Caldwell* v. *North Carolina*, 187 U. S. 622. The Supreme Judicial Court in likening the operations of the Telegraph Companies to those of dealers who bring commodities into a State and store them in a central warehouse for retail sale to purchasers ignores the fact that the arrangements with the subscribers precede the receipt of the quotations, that the value of the quotations depends upon their instantaneous transmission from the point of origin to the subscriber, and that at the relay point there is no selection, assortment or distribution, the identical quotations being sent to Boston over a Morse wire and relayed there only for convenience in transmission.

D. The matter is within the jurisdiction of the Interstate Commerce Commission. The Interstate Commerce Act applies to *telegraph, telephone and cable companies* engaged in sending messages, etc., and the Interstate Commerce Commission has ruled (Conference Rulings No. 305, March 13th, 1911) that such companies are subject to the provisions of Section 3 of the Act which makes it unlawful for carriers subject to its provisions to make or give undue or unreasonable preference or advantage in any respect whatever or to subject any person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatever. Section 15 gives the Commission jurisdiction to deal with the classifications, regulations or practices of such carriers and to correct any such classifications, regulations or practices found to be "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act." If

the refusal of the defendants in error to furnish quotations to Foster constitutes an unjust and unlawful discrimination the Interstate Commerce Commission has jurisdiction to correct the practice that has brought about such unlawful discrimination and if the Interstate Commerce Commission does not condemn it State regulations cannot interfere with it. Defendant in error argues that the jurisdiction of the Interstate Commerce Commission over the Telegraph Company applies only to those companies in their capacity as common carriers of messages and that Foster complains of them not in their capacity as common carriers of messages but as dealers in quotations. The Telegraph Companies, however, if considered merely as dealers in quotations are under no obligation not to discriminate. If they are obliged to supply the quotations to all alike such obligation arises solely out of the fact that they are common carriers. As common carriers they are engaged in interstate commerce and with respect to all the obligations attaching to them in their capacity as common carriers engaged in interstate commerce are subject to the jurisdiction of the Interstate Commerce Commission. The jurisdiction of the Commission applies equally whether the Telegraph Companies are mere carriers of the quotations or whether they acquire a sort of property interest therein or are outright puchasers thereof. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 301; *The Pipe Line cases*, 234 U. S. 548.

But how can the Companies be considered in any other capacity than as common carriers, or the quotations in any other light than as messages? The quotations are information committed to the Companies for transmission, and the precise form taken in transmission is immaterial. Congress does not confine "messages" to any precise form

or class. The proviso to first section of the "Act to regulate Commerce," says they may be classified "into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, etc." These quotations fairly fall within the named class of "commercial" messages.

E. The order of the Public Service Commission takes the property of the Telegraph Companies without due process of law; it requires them to violate their contracts with the Exchange and would furnish no defense to any action of the Exchange based on such violation. *Hunt* v. *New York Cotton Exchange,* 205 N. Y. 322. If the Telegraph Companies acquire no property right in the quotations and with respect to them are mere carriers the order takes away from bailees the property of their principal: It in effect requires the Telegraph Company to deliver to Foster messages addressed to others. (*Matter of Renville,* 46 N. Y. Ap. Div. 37.) If the Telegraph Companies acquire a "sort of property in the quotations" by virtue of which they may for their own account sell to subscribers the right to use them the case would seem still to be one of bailment: The general property right remains in the Exchange; The order requires the Telegraph Companies to disregard the limitations upon their right to dispose of the quotations.

If the Telegraph Companies by their contracts with the Exchange acquire the general property right in the quotations (which the Supreme Judicial Court of Massachusetts has not found to be the case) and they are not messages as claimed by defendant in error, then the quotations in their hands are not affected with public use. They may furnish them to some and withhold them from others, and an order interfering with their right so to do takes their property without due process

of law. A railroad company that buys timber in one state and sells it to customers in another is not obliged to treat all would-be purchasers alike. What is the difference between that case and one where a telegraph company collects or otherwise acquires the full property right in quotations? The theory advanced in *Smith* v. *Gold & Stock Telegraph Company,* 42 Hun 454; *Friedman* v. *same,* 32 Hun 4; *Shepard* v. *same,* 38 Hun 338, that quotations and presumably other property when acquired by a public carrier for sale, transportation and delivery to customers becomes so far affected with the public use that all applicants must be treated alike is fundamentally unsound, and should be considered and disapproved by this Court.

The motion of defendant in error should be denied.

Respectfully,

RUSH TAGGART,
ARTHUR LORD,
Attorneys for Plaintiffs in Error.

[9394]

LECOUVER PRESS CO., Printers, 51 Vesey St., New York, N. Y.
Telephones: Cortlandt 5570 and 5571.

## INDEX


| | Page |
|---|---|
| Motion to Dismiss or Affirm | 5 |
| Statement of the Case | 8 |
| Order of the Public Service Commission of Massachusetts | 10 |
| Assignment of Errors | 11 |
| Argument and Brief | 13 |
| Due Process of Law; no Federal Question as to | 14 |
| Interstate Commerce; no Federal Question as to. Interstate Commerce Commission, Act of June 18, 1910, Chapter 309 | 16 |
| Statement of the Contention Relied upon by the Plaintiffs In Error | 16 |
| Statement of the Contentions Relied upon by the Defendant In Error | 17 |
| Statement of Facts Found and Established by the Public Service Commission of Massachusetts with reference to the Interstate Commerce Issue | 22 |
| Extract from the Opinion of the Supreme Judicial Court of Massachusetts with reference to the Interstate Commerce Issue | 24 |
| Chapter 784 of the Acts of 1913 of the Commonwealth of Massachusetts (see Exhibit A annexed) | 32 |
| Verbatim Copy of the Opinion of the Supreme Court of Erie County, N. Y. in re Henry C. Tucker vs. Western Union Telegraph Company, et als as affirmed by Appellate Division, 155 N. Y. Sup. 1148 (see Exhibit B annexed) | 38 |
| Extract from the Opinion of Mr. Justice Dodge of the District Court of the U. S. for the District of Mass. Dec. 19, 1916. (See Exhibit C annexed). | 55 |

## INDEX TO CITATIONS


| | PAGE |
|---|---|
| Baccus vs. Louisiana 232 U. S. 233: — (58;627). | 22 |
| Central Land Co. vs. Laidley, 159 U. S. 103: — (40;91). | 14-15 |
| Cross Lake F. & S. Club vs. Louisana 224 U. S. 632: — (56;924). | 14-15 |
| Call vs. Palmer, 116 U. S. 100: — (29;559). | 20 |
| Coghlan vs. The So. Carolina RR. Co. 142 U. S. 101: — (35;957). | 20 |
| Charleston & Western Carolina Co. vs. Varnville Furniture Company, 237 U. S. 597. | 27 |
| Ches. & Ohio RR. vs. Ky. 179 U. S. 388: — (45;244). | 28 |
| Chrisman vs. Miller, 197 U. S. 313: — (49;770). | 28 |
| Erie RR. vs. N. Y. 233 U. S. 671. | 27 |
| Erie RR. Co. vs. Purdy 185 U. S. 148: — (46;847) | 28 |
| Egan vs. Hart, 165 U. S. 188: — (41;680). | 28 |
| Houston East & West Texas Ry. vs. U. S. 234 U. S. 342. | 26 |
| Hennington vs. Ga. 163 U. S. 299: — (41;166). | 28 |
| Illinois Central RR. Co. vs. RR. Commission of Louisiana 236 U. S. 157. | 25 |
| Knox vs. Exchange Bank, 12 Wall 379: — (20;414). | 14 |
| King vs. West Va. 216 U. S. 92: — (54;396). | 28 |
| Liverpool Steamship Co. vs. Phoenix Ins. Co. 129 U. S. 397: — (32;788). | 20 |
| Louisville M. O. & T. R. vs. Miss. 133 U. S. 587; — (33;784). | 28 |
| Lake Shore & M. S. R. vs. Ohio 173 U. S. 285: — (43;702). | 28 |
| Leonard vs. Vicksburg RR. 198 U. S. 416: — (49;1108). | 29 |
| Morley vs. The Lake Shore RR. 146 U. S. 162: — (36;925). | 14 |
| Missouri K. & T. R. Co. vs. Krumseig, 172 U. S. 355: — (43;454). | 20 |
| Minnesota Rate cases, 230 U. S. 352. | 26 |
| Mutual Film Corp. vs. Industrial Commission of Ohio, 236 U. S. 230. | 26 |

Page

Missouri R. & T. Co. vs. McCann, 174 U. S. 580:—(43;1093). 28
Northern Pacific Ry. vs.. Washington, 222 U. S. 370. 27
Northern Pac. R. R. Co. vs. Messe 239 U. S. 613:—(60:467). 22
Osborne vs. Fla. 164 U. S. 650:—(41;586). 28
Overton vs. Oklahoma 235 U. S. 31;—(59; 112). 28
Pritchard vs. Norton, 106 U. S. 130:—(26; 104). 20
Pennsylvania RR. vs. Knight, 192 U. S. 21. 26
Port Richmond Ferry vs. Hudson County, 234 U. S. 317. 27
Rankin vs. Emigh, 218 U. S. 27:—(54;915). 28
St. Paul RR. Co. vs. Todd, 142 U. S. 282:—(35;1014). 15
Scudder vs. The Union National Bank, 91 U. S. 406:—(23;245). 20
Southern Ry. Co. vs. RR. Commission of Indiana, 236 U. S. 439. 27
Stone vs. Farmer's Loan & Trust Co. 116 U. S. 307:—(29;636). 28
Turner vs. The Wilkes Co. 173 U. S. 461:—(43;768). 15
Tucker vs. W. U. Tel. Co. Erie Co. Supreme Court, N. Y. June, 1915. 21-38
Tucker vs. W. U. Tel. Co. 155 N. Y. Sup. 1148. 21-38
Texas & N. O. vs. Sabine Tram Co. 227 U. S. 111. 25
Texas & Pacific Ry. vs. U. S. 234 U. S. 342. 26
W. U. Tel. Co. vs. Bilisoly, 116 Va. 562. 27
W. U. Tel. Co. vs. James, 162 U. S. 650:—(40;1105) 28
Waters Peirce Oil Co. vs. Texas, 212 U. S. 86:—(53;417). 28

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 680

WESTERN UNION TELEGRAPH COMPANY & UNITED TELEGRAM COMPANY,

PLAINTIFFS IN ERROR

vs

FREDERICK J. MACLEOD, ET ALS, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF OF MASSACHUSETTS; AND CALVIN H. FOSTER.

DEFENDANTS IN ERROR

On Writ of Error to Supreme Judicial Court for the Commonwealth of Massachusetts.

---

## MOTION FOR AN ORDER TO DISMISS OR AFFIRM THIS CAUSE OR IF THE SAME BE DENIED THEN THAT THE CAUSE BE TRANSFERRED TO THE SUMMARY DOCKET

Now comes the defendant in error, Calvin H. Foster by his counsel, Patrick Henry Kelley, and moves the Court to dismiss or affirm the writ of error in the above case, or if the same be denied then in such case to transfer the cause to the summary docket, and for grounds thereof assigns the following, to wit: —

1. That this Honorable Court is without jurisdiction to review on writ of error the decree of

the Supreme Judicial Court of Massachusetts for the reason that no Federal question is involved in the same.

2. In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss said writ of error and should retain jurisdiction upon the same that in such case that the decree of said Supreme Judicial Court of Massachusetts be affirmed, as it is manifest that said writ of error was taken by plaintiff in error for delay only, and that the questions upon which decision of said cause depends are so frivolous as not to need further argument.

3. The defendant in error further moves the Court that in the event that it should desire to hear argument upon the questions involved that this cause be transferred to the summary docket, and there be proceeded with on the ground that the cause is of such a character as not to justify extended argument.

The statement of the case, the grounds of this motion and the arguments thereon are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

PATRICK HENRY KELLEY.

Attorney for Calvin H. Foster, Defendant in Error.

ARTHUR LORD, ESQ.,
60 State Street,
Boston, Mass.

Attorney for the Western Union Telegraph Company & United Telegram Company, plaintiffs in error, in the case No. 680, October Term, 1916, Supreme Court of the United States.

Dear Sir: —

Please take notice that on the 22nd day of January, 1917, at the opening of the Court or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for its decision.

Attached hereto please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to

transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

PATRICK HENRY KELLEY,

Attorney for Calvin H. Foster, Defendant In Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this day of 1916.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 680

WESTERN UNION TELEGRAPH COMPANY & UNITED TELEGRAM COMPANY
Plaintiffs in Error

*VS.*

FREDERICK J. MACLEOD ET ALS, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS; AND CALVIN H. FOSTER.
Defendants in Error.

# BRIEF FOR DEFENDANT IN ERROR, CALVIN H. FOSTER, ON MOTION TO DISMISS OR AFFIRM.

## STATEMENT

The initial proceeding in this case was a complaint filed by Calvin H. Foster one of the defendants in error under the provisions of Chapter 784 of the Acts of 1913 of the Commonwealth of Massachusetts (a copy of the material portions thereof are annexed at end of Brief as Exhibit "A") with the Public Service Commission of the said Commonwealth against the Western Union Telegraph Company and the United Telegram Company by which complaint it was charged that the above-named Telegraph Companies were unlawfully discriminating against the said Foster by withholding and refusing to sell and deliver to him the

continuous quotations made on the New York Stock Exchange which said quotations the Telegraph Companies were furnishing to others.

After the complaint had been filed with the Public Service Commission and notice given to the Telegraph Companies the said Telegraph Companies thereafter appeared and filed their answers to the complaint of said Foster; the substance of the defence raised by the aforesaid answers was that the Telegraph Companies refused to deliver the continuous quotations of the New York Stock Exchange and the stock ticker service because the complainant Foster had not been approved by the New York Stock Exchange; the answer alleged that under the contract which the said Telegraph Companies had made with the New York Stock Exchange and which was annexed to the answer that said Telegraph Companies were prohibited from delivering the said quotations to persons who had not first secured the approval of said Stock Exchange; and that to compel the Telegraph Companies to furnish the said service to the complainant would thereby appropriate the property of the New York Stock Exchange to the benefit of the complainant, and thereby result in the violation of contractural rights contrary to the provisions of the Federal Constitution protecting the deprivation of property without due process of law; and it was further alleged in said answer that the Public Service Commission was without jurisdiction over the subject matter of Foster's complaint, because the said subject matter was within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress.

Thereafter there was a hearing on the merits before the Public Service Commission of the Commonwealth of Massachusetts and the said Public Service Commission filed its report consisting of findings of facts and conclusions of law and also the entry of an order of the following tenor, to wit: —

ORDER

"It appearing that the Gold & Stock Telegraph Company, by the Western Union Telegraph Company, lessee; and the United Telegram Company, have without just cause denied and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of tickers service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination; and it is

ORDERED, That the Gold & Stock Telegraph Company by the Western Union Telegraph Company, lessee, and the United Telegram Company shall forthwith remove said discrimination."

The said Telegraph Companies refused to obey the said order of the Public Service Commission and took an appeal as provided by the provisions of said Chapter 784 of the Acts of 1913 to the Supreme Court for the County of Suffolk which said appeal was begun by the filing of petition in said Court seeking to annul the order of the said Public Service Commission above-mentioned. Thereafter Foster and the members of the Public Service Commission of Massachusetts filed their answers to the Telegraph Companies' petition above set forth, the said respondent Foster being represented by P. H. Kelley, Esquire, and the Public Service Commission being represented by H. Ware Barnum, Esquire, Asst. Attorney General of the Commonwealth.

The Public Service Commission through the Attorney General's Department in accordance with the provisions of said Chapter 784 of the Acts of 1913 then brought a Bill In Equity against the said Telegraph Companies, the purpose of said Bill being to compel the said Telegraph Companies to obey the order of the said Public Service Commission. After the pleadings had been completed in the above two cases, both cases were reserved by the single Justice of the Supreme Court for the determination of the Supreme Judicial Court for the Commonwealth. It was alleged in the petition of the Telegraph Companies above described that the

Public Service Commission was without jurisdiction over the subject matter of the complaint of Calvin H. Foster, and that the order of said Commission was therefore null and void, because the subject matter of said complaint was within the sole jurisdiction of the Interstate Commerce Commission. It was also alleged in said petition that the said order of the said Public Service Commission deprived the New York Stock Exchange and the said Telegraph Companies of their property rights in said contract without due process of law contrary to the provisions of the Federal Constitution.

Thereafter the cases so reserved for the determination of the Supreme Judicial Court for the Commonwealth were argued before said Court, on which occasion the New York Stock Exchange through counsel appeared and filed a brief in support of the contentions raised by the Telegraph Companies; thereafter the Supreme Judicial Court for the Commonwealth filed its rescript in both cases dismissing the petition of the Telegraph Companies and ordering a decree to be entered commanding the Telegraph Companies to comply with the order of the said Public Service Commission.

Final decrees having been entered in accordance with the rescript of the Supreme Judicial Court of the Commonwealth thereupon the said Telegraph Companies sued out a writ of error, thereby bringing the cases to this Honorable Court upon the following assignment of errors, to wit: —

---

## "ASSIGNMENT OF ERRORS."

"And now comes The Western Union Telegraph Company and the United Telegram Company, plaintiffs in error, (the original respondents) and with their petition for a writ of error make and file the following assignment of errors, and respectfully submit that in the final judgment and decree, and the proceedings had prior thereto, of the Supreme Judicial Court,

within and for the County of Suffolk, in the Commonwealth of Massachusetts, in the above entitled cause, there is manifest error, in that said Court erroneously refused to rule as requested in the answer of said plaintiffs —

"1. That the Public Service Commission is without jurisdiction over the subject matter of the complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress, and said Public Service Commission, therefore, had no jurisdiction to enter the order complained of.

"2. In that said Court did erroneously rule and decided against the prayer of the plaintiffs in error that the Public Service Commission had jurisdiction over the subject matter of the complaint set forth in said petition, and that the same was not within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress, and that said Public Service Commission therefore, had jurisdiction to enter the order complained of.

"3. In that said Court erroneously refused to rule, as requested in the answer of said plaintiffs in error, that said plaintiffs, The Western Union Telegraph Company and the United Telegram Company, would be required, in order to comply with said order, to wit, the order of the Public Service Commission of Massachusetts, to appropriate the property of said New York Stock Exchange for the benefit of said Foster, and thereby destroy their valuable contracts with said Exchange, contrary to the provisions of the Federal Constitution, in that your petitioners would thereby be deprived of their property without due process of law.

"4. In that said Court did erroneously rule and decide that your petitioners, The Western

UnionTelegraph Company, and the United Telegram Company, would not be required, in order to comply with said order, to appropriate the property of said New York Stock Exchange, for the benefit of said Foster, contrary to the provisions of the Federal Constitution, and that your petitioners would not thereby be deprived of their property by due process of law."

---

## ARGUMENT AND BRIEF.

The specific errors set forth in the above assignment of errors while four in number are reducible in substance to two, to wit: —

A. That the plaintiffs in error would be required in order to comply with the Order of the Public Service Commission of Massachusetts to appropriate the property of the New York Stock Exchange for the benefit of Foster, the defendant in error, and thereby destroy valuable contracts of the plaintiffs in error with said Exchange contrary to the provisions of the Federal Constitution in that the plaintiffs in error would thereby be deprived of their property without due process of law, and that the Supreme Judicial Court in holding and deciding to the contrary was in error.

B. That the Public Service Commission of Massachusetts had no jurisdiction over the subject matter of Foster's complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission; and that the Supreme Judicial Court was in error in holding and deciding to the contrary.

Both of these claims will be now discussed in the order in which they are stated.

## THE RECORD PRESENTS NO FEDERAL QUESTION UNDER THE ALLEGED CLAIM THAT THE PLAINTIFFS IN ERROR WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY THE ORDER OF THE PUBLIC SERVICE COMMISSION.

The claim made by the plaintiffs in error that the Order of the Public Service Commission compelled the Telegraph Company to violate its contract with the plaintiff Stock Exchange raises no Federal question. The record shows that the plaintiffs in error were given a full opportunity to be heard before the said Order was issued and that the said Order was issued after a full hearing on the merits. The alleged violation of the contract rights of the plaintiffs in error under the Federal Constitution is based upon the claim that the Supreme Judicial Court of the Commonwealth as well as the Public Service Commission erroneously construed the contract between the New York Stock Exchange and the plaintiffs in error. It is fundamental, however, that where the parties have been fully heard in the regular course of judicial procedure that an alleged erroneous decision of a State Court construing a contract does not raise a Federal question because the unsuccessful party in such case is not deprived of his property without due process of law contrary to the Federal Constitution. Courts of the United States have no jurisdiction to correct such an alleged error.

*Knox vs. Exchange Bank, 12 Wall 379:* — (*20;414*).
*Morley vs. Lake Shore RR. 146 U. S. 162:* — (*36;925*).
*Central Land Co. vs. Laidley 159 U. S. 103:* — (*40;91*).
*Cross Lake F. & S. Club vs. Louisiana 224 U. S. 632:* — (*56;924*).

Even where the Federal question upon which the jurisdiction of the Courts of the United States is based grows out of an alleged impairment of the obligation of a contract it is now definitely settled that a contract can only be impaired within the meaning of this clause of the constitution so as to give the Federal courts jurisdiction where the State statute has been passed subsequent to the making of the contract which is alleged to have been impaired. Chapter 784 of the Acts of 1913 of the Commonwealth of Massachusetts was in existence before the contract between the Stock Exchange and the plaintiffs in error was made, the latter having been executed and delivered July 1, 1914. There is no possible ground upon which to base the claim that the plaintiffs in error were deprived of their property without due process of law.

*Central Land Co. vs. Laidley 159 U. S. 103:— (40;91).*
*St. Paul RR. Co. vs. Todd, 142 U. S. 282:—85; 1014).*
*Turner vs. The Wilkes Co. 173 U. S. 461:— (43; 768).*
*Cross Lake F. & S, Club vs. Louisiana 224 U. S. 632:— (56;924).*

It is apparent from the foregoing argument and citation of authorities that no Federal question is presented by the record on the ground that the plaintiffs in error were deprived of their property without due process of law.

## THERE IS NO FEDERAL QUESTION PRESENTED BY THE RECORD WITH REFERENCE TO THE CLAIM THAT THE SUBJECT MATTER OF FOSTER'S COMPLAINT RELATED TO A TRANSACTION IN INTERSTATE COMMERCE OF WHICH THE INTERSTATE COMMERCE COMMISSION HAD SOLE JURISDICTION.

The jurisdiction of the Interstate Commerce Commission over telegraph companies was conferred under the Act of June 18, 1910, Chapter 309, Section 7, amending Section 1 of the Interstate Commerce Act; said Section 1 as so amended reading so far as telegraph companies are concerned as follows, to wit:—

> "Section 1. That the provisions of this Act shall apply to telegraph, telephone and cable companies engaged in sending messages from one state, territory or district of the United States to any other state, territory or district of the United States, or to any foreign country and who shall be considered and held to be common carriers within the meaning and purpose of this Act; provided, however, that the provisions of this Act shall not apply to the transmission of messages by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country or from or to any state or territory as aforesaid."

---

## CONTENTIONS OF THE PLAINTIFFS IN ERROR

The plaintiffs in error contend that in furnishing and distributing the quotations made on the New York Stock Exchange to subscribers in Boston that they are acting as a common carrier of messages sent to such subscribers in Boston by the New York Stock

Exchange from New York; that consequently the sending of such quotations as messages sent by the New York Stock Exchange from New York to the Boston subscribers constitutes the sending of interstate messages over which the Interstate Commerce Commission has sole jurisdiction in accordance with the provisions of the Act of Congress June 18, 1910, Chapter 309.

---

## CONTENTIONS OF CALVIN H. FOSTER, DEFENDANT IN ERROR.

The defendant in error, Foster, contends that there are no facts in the Record from which it can be claimed that the Interstate Commerce Commission has jurisdiction over the subject matter of his complaint filed with the Public Service Commission of Massachusetts and that no Federal question appears on the Record because: —

FIRST: — The jurisdiction of the Interstate Commerce Commission over telegraph companies is a jurisdiction and power to enforce the obligations and duties of telegraph companies towards the public solely in their capacity and character as common carriers of interstate messages; that the Interstate Commerce Commission has no jurisdiction over telegraph companies merely in their capacity and character as public service corporations, nor to enforce the obligations or duties of telegraph companies towards the public while acting in any other character or capacity or engaged in any other business than that of a common carrier of messages.

SECOND: — The subject matter of Foster's complaint against the said plaintiffs in error did not relate to the refusal or neglect of the plaintiffs in error to perform any obligation or duty

which the plaintiffs in error owed to the said Foster with respect to the transmission, delivery or receipt of messages of any nature or description; nor did said complaint relate to the refusal or neglect of the plaintiffs in error to perform any obligations or duty which the plaintiffs in error owed to the said Foster in their capacity as a common carrier.

THIRD : — The subject matter of Foster's complaint to the Public Service Commission was and is based solely upon the fact that the plaintiffs in error being public service corporations authorized to engage in and conduct the business of transmitting intelligence within the Commonwealth of Massachusetts were actually engaged in the business of selling and distributing for their own account and risk in the City of Boston and said Commonwealth a valuable commodity, to wit, Commercial News, the same being the continuous quotations of the New York Stock Exchange; that for the purpose of selling, furnishing and distributing the said quotations in Boston to their subscribers in Boston that the plaintiffs in error send the said quotations from their New York office to their Boston office in Morse Code Telegraph Despatch Form; that after the said quotations are received in the Boston office of the plaintiffs in error they are transcribed and translated from the Morse Code Form into common English and thereafter sent to the various subscribers in Boston; that both the Public Service Commission and the Supreme Judicial Court positively and expressly ruled that the sending of the said quotations from New York to the Boston offices of the plaintiffs in error in Morse Code Despatch Form did constitute Interstate Commerce, and that the provisions of said Chapter 784 of the Acts of 1913 nor the jurisdiction of the Public Service Commission under that Act could apply to the

sending of said quotations between the New York and the Boston offices of the plaintiffs in error; the Public Service Commission and the Supreme Judicial Court both held that the provisions of said Chapter 784 of the Acts of 1913 applied solely to the transportation entirely within Massachusetts of the quotations after their arrival in Boston and after they had been translated into the English alphabet and made ready for delivery to subscribers in Boston.

FOURTH:—And the defendant in error Foster contends that the Public Service Commission found as a fact upon the evidence before it that the sending of the quotations from the Boston offices of the plaintiffs in error to their Boston subscribers on the stock ticker in the form of the English alphabet was and is a separate and independent transaction from the sending of the quotations in Morse Code Telegraph Despatch Form from the New York to the Boston offices of the plaintiffs in error; that the said finding being a finding of fact is conclusive and not subject to review on writ of error; that it thereby necessarily follows that no Federal question as to the jurisdiction of the Interstate Commerce Commission is presented by the record, as the jurisdiction of the Public Service Commission under said Chapter 784 of the Acts of 1913 applied solely to the local and domestic transmission of the quotations.

The plaintiffs in error rely upon their contracts with the New York Stock Exchange as conclusive in establishing the fact that in furnishing and distributing the quotations they are acting solely in the capacity as a common carrier of messages sent by the New York Stock Exchange to such subscribers; the interpretation and validity of a contract, however, is determined by the law of the State where the contract is made and the Federal Courts will follow the construction of the State Courts.

*Scudder vs. Union National Bank, 91 U. S. 406:* — (23-245)

*Pritchard vs. Norton, 106 U. S. 130:* — (26;104).

*Call vs. Palmer 116 U. S. 100:* — (29;559)

*Liverpool Steamship Co. vs. Phoenix Ins. Co. 129 U. S. 397:* — (32;788).

*Coghlan vs. So. Carolina RR. Co. 142 U. S. 101:* — (35;957).

*Missouri K. & T. S. Co. vs. Krumseig 172 U. S. 355:* — (43;454).

In the case of the Western Union Telegraph Company vs. Tucker, the identical contract which was in issue in the case at bar was very recently before the New York Courts for construction and interpretation. It was then held that the contract between the Western Union Telegraph Company and the New York Stock Exchange was a contract under which the Stock Exchange sold the property rights in its quotations to the Telegraph Company for the gross sum of $50,000 per annum to be paid by the Telegraph Company. That the only right which the Stock Exchange retained in the quotations after delivery to the Telegraph Company was the right to prevent the delivery of the quotations to persons intending to use the quotations for an illegal or unlawful purpose; that in furnishing and delivering the quotations to its subscribers that the Telegraph Company was not acting in its capacity as a common carrier of messages sent by the plaintiff Stock Exchange and that section 552 of the Penal Code of New York regulating the sending of messages by telegraph companies had no application; that the Telegraph Company was acting solely in its own individual right as the vendor of valuable news and information; that the Telegraph Company was under no obligation to the New York Stock Exchange under the contract to furnish, distribute or disseminate the news or information contained in the quotations after it had been delivered to the Telegraph Company by the Exchange; that such obligation

was a collateral undertaking apart from its ordinary and usual occupation as a common carrier of messages for hire. It was also expressly held that if the Telegraph Company saw fit to engage in the business of furnishing and distributing quotations which it received from the Stock Exchange to some of the public desiring the same, that it must furnish them to all persons standing upon the same equality; and that the Telegraph Company could not furnish the information to some and withhold it from others without lawful justification.

*Tucker vs. W. U. Tel. Co. Erie Co. Supreme Court, N. Y., June, 1915*

*Affirmed unanimously by Appellate Div. Dec., 1915, 155 N. Y. Sup. 1148.*

NOTE

A verbatim copy of the Opinion written by Judge Pooley in the above case is annexed for the convenience of this Honorable Court as Exhibit "B."

The Western Union Telegraph Company is a New York corporation and the Stock Exchange is domiciled in and regulated by the laws of New York. The identical contract which the plaintiffs in error rely upon in this case was made, executed and delivered in the State of New York. In the Tucker case above cited one of the principal issues in the case was the issue whether or not the plaintiff in error, the Western Union Telegraph Company, was acting as a common carrier of messages in furnishing and distributing the quotations to subscribers in New York and within the provisions of Section 552 of the Penal Code regulating the sending of messages by Telegraph Companies. In the opinion written by Judge Pooley which was unanimously affirmed by the Appellate Division, the Court expressly ruled that the plaintiff in error was not acting as a common carrier of messages; that no messages of any nature or description were sent either by the Stock Exchange or by the Telegraph Company and that the statute regulating the

sending of messages by Telegraph Companies had no application. This Honorable Court will accept the contruction of the New York Courts on that issue as conclusive.

*Baccus vs. Louisiana 232 U. S. 233:* — (*58;627*).
*Northern Pacific R. R., vs. Meese 239 U. S. 618 (60; 467)*

---

## STATEMENT OF FACTS FOUND AND ESTABLISHED BY THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS AND WHICH CONCLUSIVELY SHOW THAT NO FEDERAL QUESTION SUCH AS TO GIVE THIS COURT JURISDICTION ON WRIT OF ERROR WAS INVOLVED IN THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The material facts found by the Massachusetts Public Service Commission with reference to the furnishing and distributing of the quotations to subscribers in Boston were as follows: —

> "There is involved in this case as we view it no question concerning the duty to the public of a telegraph company in its ordinary telegraph business of carrying or transmitting messages to the public for hire. The business of the respondents which we are dealing with is as we have before noted a public business of a very different character. There are no messages sent from anywhere. The respondents purchase in New York City a certain commodity or property to wit, quotations of the New York Stock Exchange. They are under no obligation to the Exchange to send this property or commodity

anywhere. In order to resell or retail it in Boston the respondents have it conveyed or shipped to Boston by the only means by which it can effectively be conveyed over fast wire telegraph lines, — in the case of the Gold & Stock Telegraph Company over the wires of the Western Union Telegraph Company, and in the case of the United Telegram Company over the wires of the Postal-Telegraph Cable Company. It is delivered in Morse Code at the main office of the respondents in Boston, and at these offices it is translated into words and numerals in the ordinary alphabet and sent out over their respective stock telegraph systems to their various patrons. Each of the respondents has a main office where there are certain electrical appliances with a key board attachment. These appliances are connected by a system of wires and cables running under and across the public ways of the city with the ticker instruments in the office of the patrons. The quotations to be distributed are delivered into the main office and forthwith an employee operating the keyboard causes them to be written simultaneously by means of the so-called ticker instruments, upon a tape of paper in the office of every patron where they can be easily read."

From the above facts which have been conclusively established by the Report of the Public Service Commission it is manifest that the sending of the quotations in Morse Code Telegraph Despatch Form from the New York office of the Telegraph Company to the Boston office of the Telegraph Company is an entirely separate, distinct and independent transaction from the sending of the quotations after their arrival in Boston to the subscribers in Boston. The quotations as sent from New York to Boston are not sent to, addressed to, or intended to be delivered to the subscribers in Boston in the Morse Code Telegraph Despatch Form. A delivery of the quotations to the subscribers in Boston in the Morse Code Telegraph

Despatch Form is physically impossible under the facts and circumstances in this case showing how the business is conducted because; — the quotations as delivered to the subscribers in Boston are delivered by means of the stock ticker instrument which prints the quotations in the English alphabet and numerals only. These stock ticker instruments could not possibly register the quotations on a printed tape in Morse Code Telegraph Despatch Form because to do that would require a Morse instrument on the receiving end; again; the subscribers in Boston would have no use for the quotations delivered to them in Morse Code Telegraph Despatch Form as they could not be read by the subscribers; so that if you assume for the purpose of argument that the quotations as sent from New York to Boston are to be treated as messages it is clear that the message in such case is a message sent by the plaintiff in error from New York as sender to the plaintiff in error in Boston as receiver; and again, if you assume for the purpose of argument that the quotations after being translated in Boston and sent to the Boston subscribers are to be treated as messages that they are in such case messages sent by the Telegraph Company as the sender to the subscriber.

*In other words there are no messages sent to the subscribers in Boston from New York at all; the message so called for the purpose of argument which is actually sent to the subscribers in Boston first originates and is first written or printed in Boston and thereafter delivered to the subscriber in Boston.*

In passing upon the above facts established by the Report of the Public Service Commission the Supreme Judicial Court for the Commonwealth used the following language, to wit: —

> "The transactions disclosed on this record as having been dealt with by the Public Service Commission, did not constitute interstate commerce. The sending of the quotations from New York to Boston over wires in the ordinary course of telegraphy manifestly was interstate commerce.

But, as has been pointed out, the Telegraph Company as to their ticker service sent no messages from New York to the individual ticker subscribers. The quotations as messages were sent by the Morse Code from New York to the Telegraph Companies at their Boston offices. The quotations there were transferred by their own employees to instruments of a different character. By the ticker service the information was delivered to their patrons in Boston. The telegraph companies, in making this transmutation from the Morse Code Telegraphic message, by which the quotations came from New York to their Boston offices, to the plain English of the tape on the ticker service through their own instrumentalities and mechanical devices, and through their own servants in their Boston offices, were pursuing a course somewhat, although not precisely, analagous to breaking the bulk of merchandise received by interstate commerce, putting it into smaller packages and delivering it in retail trade. The interstate transmission ended when the quotations reached the Boston offices. The subsequent acts in delivering the information upon the tickers in the offices of its customers were new and independent transactions. It was in effect a sale at retail of the information which it had received by interstate commerce."

"These transactions are different in their nature from continuous transportation of merchandise in interstate commerce, notwithstanding change in bill-of-lading, interruption of transit, and the like, where the initial purpose to transport by interstate or foreign commerce and the movement of the merchandise in such transportation is not changed but continues unbroken from the beginning despite temporary suspensions. Cases like Texas & New Orleans vs. Sabine Tram Co., 227 U. S. 111; Illinois Central RR. vs. RR. Commission of Louisiana 236 U. S. 157, which illustrate

that principle, are inapplicable to the facts in the case at bar."

"It is not necessary to multiply citations to show the fullness and completeness of the control of the Congress over interstate commerce. It is undisputable. Minnesota Rate cases 230 U. S. 352; Houston, East & West Texas Ry. vs. U. S. & Texas & Pac. Ry. vs. U. S. 234 U. S. 342. The binding authority of these and like decisions is implicitly recognized. They do not seem pertinent to the facts of this record. While no analogy between information and chattels can be perfect, the case at bar is indistinguishable from a purchase of a quantity of like books by the Telegraph Company in New York for a gross price for the lot, the transportation of these in interstate commerce to their Boston offices, where the original packages are opened and single books sold there to individual customers, to whom they are delivered by messengers of the telegraph companies. The method of dealing with them after the interstate commerce is ended by delivery in bulk at the main offices in Boston is no part of interstate commerce. In this respect the case is like the cabs of the railroad employed solely in the local transportation of passengers who have come in interstate travel, which are subject to local regulation and are not a part of interstate commerce. Pennsylvania RR. vs. Knight, 192 U. S. 21; the ticker service under the circumstances here disclosed is "subject to the law of the State." Mutual Film Corp. vs. Industrial Commission of Ohio, 236 U. S. 230."

"The Federal Interstate Commerce Act does not appear to us to apply to the transaction here in question. Act of June 18, 1910, 36 U. S. St, at Large; Chap. 309, Sec. 7, pages 539–544. That Act relates to the transmission of messages by telegraph in interstate commerce. So far as

that Act manifests a purpose to regulate the field over which Congress has paramount authority, the right of the state to exercise its police power and in the same field ceases to exist, no matter whether the particular act of Congress covers it entirely or not. The police power of the State may be put forth as to a subject not prohibited to the States within national jurisdiction, only when by the silence of Congress the nation has left it open. But when Congress speaks, then it supersedes existing, and prevents future, legislation by the several States on that subject. The Act of Congress here in question does not cover the local delivery by ticker service radiating from Boston offices, to patrons in that city of each of the telegraph companies, of information bought by the telegraph companies and received in interstate commerce, but delivered in intrastate commerce under the circumstances disclosed in the cases at bar. Therefore, cases like Northern Pac. Ry. Co. vs. Washington, 222 U. S. 370; Erie RR. vs. N. Y. 233 U. S. 671, Port Richmond Ferry vs. Hudson County, 234 U. S. 317, Southern Ry. Co. vs. RR. Comm. of Ind. 236 U. S. 439, Charleston & Western Carolina Co. vs. Varnville Furniture Co. 237 U. S. 597, and W. U. Tel. Co vs. Bilisoly, 116 Va. 562 have no application."

It is manifest and clear from the above extract from the opinion of the Supreme Judicial Court of Massachusetts that in construing the provisions of said Chapter 784 of the Acts of 1913 with reference to the powers and jurisdiction of the Public Service Commission over the plaintiffs in error as telegraph companies engaged in the transmission of intelligence, that the Supreme Judicial Court expresly limited the jurisdiction of the Public Service Commission under the above act to the local and domestic transportation of the quotations by the plaintiffs in error wholly within the Commonwealth of Massachusetts.

**It is fundamental that a Federal question does not arise where the claim is made that a State statute, regulation or order is inconsistent with or repugnant to the power of Congress to regulate commerce among the States where the highest Court of the State held that such statute regulation or order was intended to apply and applied only to domestic transportation within such State.**

*Stone vs. The Farmer's Loan & Trust Co. 116 U. S. 307:* — *(29;636).*

*Louisville M. O. & T. R. vs. Miss. 133 U. S. 587:* — *(33;784).*

*W. U. Tel. Co. vs. James, 162 U. S. 650:* — *(40; 1105.)*

*Hennington vs. Ga. 163 U. S. 299:* — *(41;166).*

*Osborne vs. Fla. 164 U. S. 650:* — *(41;588).*

*Lake Shore & M. S. R. vs. Ohio, 173 U. S. 285:* — *(43;702).*

*Mo. R. & T. Co. vs. McCann, 174 U. S. 580:* — *(43;1093).*

*Ches. & Ohio RR. Co. vs. Ky. 179 U. S. 388:* — *(45;244).*

*Erie RR. Co. vs. Purdy, 185 U. S. 148:* — *(46;847).*

*Overton vs. Oklahoma, 235 U. S. 31:* — *(59;121).*

**The facts found by the Public Service Commission of Massachusetts will be accepted as conclusive on writ of error to the Federal Supreme Court.**

*Egan vs. Hart, 165 U. S. 188:* — *(41;680).*

*Chrisman vs. Miller, 197 U. S. 313:* — *(49;770).*

*Waters-Peirce Oil Co. vs. Texas, 212 U. S. 86:* — *(53;417).*

*King vs. W. Va. 216 U. S. 92:* — *(54;396).*

*Rankin vs. Emigh, 218 U. S. 27:* — *(54;915).*

The Public Service Commission in its finding of fact established the fact that no messages are sent to subscribers for the quotations in Boston from New York at all, and that the sending of the quotations to subscribers in Boston was a new and independent transaction beginning and ending in Boston after the quotations were received in Morse Code form, it is clearly apparent from the numerous decisions of this Honorable Court previously cited, that a claim that a state statute, regulation or order is inconsistent or repugnant to the power of Congress to regulate commerce does not raise a Federal question where the statute, regulation or order was held by the State courts to apply solely to domestic transportation; under the above circumstances and conditions it is clearly apparent that the question now attempted to be raised is so foreclosed as to afford no basis for a writ of error.

*Leonard vs. Vicksburg R. R. 198 U. S. 416:— (49;1108).*

It is apparent from the foregoing Statement of the Case and Citations of Authorities relating to the issues raised on this writ of error that there is no real substantial merit in any single claim of all the various claims which have been advanced by the Telegraph Company or the Stock Exchange from the moment that they unlawfully refused to supply the defendant in error Foster with the service to which he was entitled.

The Massachusetts Public Service Commission found as a fact that the defendant Foster was entitled to receive the quotations of the New York Stock Exchange upon an equality with all other persons now receiving the same. No legal or valid reason has been shown to exist why Foster should not get this service from the Telegraph Company. Under the provisions of Chapter 784 of the Acts of 1913 of the Commonwealth of Massachusetts, it was the purpose of the Legislature to compel immediate obedience to all legal orders of the Public Service Commission.

The order of the Public Service Commission commanding the Telegraph Companies to refrain from all unlawful discrimination against Foster was issued in September, 1915. And the plaintiffs in error refused to obey the said order and took an appeal to the Supreme Judicial Court of Massachusetts on the questions of law involved in the construction of the contract between the plaintiffs in error and the New York Stock Exchange. The contention advanced before the Public Service Commission and the Supreme Judicial Court of Massachusetts by the Telegraph Company, to wit, that a telegraph company can by contract with a third party bind itself to unlawfully discriminate against members of the public is so absurd and so preposterous when viewed either as a question of ethics or as a question of law as to necessarily stamp all other claims connected therewith or arising therefrom either directly or collaterally as insincere and intended for delay.

Upon the facts found by the Massachusetts Public Service Commission the defendant in error Foster would be entitled to the same relief from the Interstate Commerce Commission that has been granted to him by the Public Service Commission of Massachusetts; and it was solely for the purpose of delay that the writ of error in this case was instituted as the defendant in error Foster is still without the service to which he is lawfully entitled to as a result of the *supersedeas* issued with the writ of error.

It is respectfully submitted that the writ of error should be dismissed, or the decree of the State Court affirmed; but failing therein that the case be transferred to the summary docket.

PATRICK HENRY KELLEY,
Attorney for Calvin H. Foster, Defendant In Error.
16 State Street,
Boston, Mass.

NOTE). The same questions that are raised by this Motion to Dismiss were decided in favor of the defendants in error in the United States District Court for the District of Massachusetts in a suit brought by the New York Stock Exchange against the defendants in error and the Western Union Telegraph Company, the scope and object of the bill being to prevent the Western Union Telegraph Company from obeying the decree of the Supreme Judicial Court of Massachusetts, it being alleged in the bill that the Telegraph Company was about to obey the decree of the Supreme Judicial Court by furnishing the quotations to Foster. The jurisdiction of the Court was based not upon an allegation showing diversity of citizenship, *but solely upon the ground that the Stock Exchange was deprived of its property without due process of law by the decision of the Massachusetts Tribunals with the further allegation that the subject matter of the proceedings in the Massachusetts Courts were within the sole jurisdiction of the Interstate Commerce Commission, and that the order of the Public Service Commission and the decree of the Supreme Judicial Court were therefore void.* The bill was ordered dismissed by a decree of Mr. Justice Dodge of the United States District Court for the District of Massachusetts on December 19, 1916. An extract from the Opinion of Mr. Justice Dodge is hereto annexed to the brief of the defendant in error and marked Exhibit "C."

## EXHIBIT "A".

### Chapter 784 of the Acts of 1913

ENTITLED

### AN ACT TO CHANGE THE NAME, ENLARGE THE MEMBERSHIP AND INCREASE THE POWERS OF THE BOARD OF RAILROAD COMMISSIONERS.

"SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the Commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services:—

*a.* The transportation or carriage of persons or property, or both, between points within the Commonwealth by railroads, street railways, hereinafter called railways, electric railroads, and steamships, including express service and car service carried on upon or rendered in connection with such railroads, railways, electric railroads or steamships.

*b.* The operation of all conveniences, appliances, facilities, or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or by whomsoever provided, whether the service be common carriage or merely in facilitation of common carriage.

*c.* The transmission of intelligence within the Commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equip-

ment utilized in connection therewith or appertaining thereto.

SECTION 10. The Commission may inquire into the rates, charges, regulations, practices, equipment and services of common carriers in this Commonwealth, and elsewhere, rendering any service of a kind subject to its jurisdiction. It may be represented at any public hearings before any legislative committee or public board in this Commonwealth, or of any other State or of the United States, with respect to any proposed legislation or action by public authorities within or without the Commonwealth affecting any public service within the Commonwealth subject to its supervision, whenever in its opinion such representation is desirable in the interests of this Commonwealth. It may apply by petition to the Interstate Commerce Commission for relief, and may present evidence and arguments to the said Commission, in any case in which it is of opinion that a common carrier subject to its supervision is violating any provision of the interstate commerce law or any valid order or regulation made under authority thereof. The Commission may also confer with or appear before boards of other States having powers over any of the common carriers rendering public services of the kind hereinbefore described, when in its judgment the interests of the Commonwealth will be promoted thereby.

SECTION 11. The Commission may, either through its members or by employees duly authorized by it, examine all books, contracts, records, documents, papers and memoranda of any common carrier, and by *subpoena duces tecum* compel the production thereof, or of duly verified copies of the same or any of them, and compel the attendance of such witnesses as the Commission may require to give evidence at any such examination.

SECTION 17. All charges made, demanded or received by any common carrier subject to the supervision of the Commission for any service rendered or performed, or to be rendered or performed by it or in connection therewith in the conduct of its common

carrier business, or made, demanded or received by any two or more common carriers joining in rendering or performing any service shall be just and reasonable, and every such common carrier and any two or more such common carrriers joining in rendering or performing any service shall be entitled to make, demand and receive just and reasonable charges for any such service, and every unjust or unreasonable charge is hereby prohibited and declared unlawful.

SECTION 20. Every common carrier shall file with the Commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the Commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the Commission may order. In the case of common carriers the forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the Interstate Commerce Commission. No common carrier shall, except as otherwise provided, in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the Commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified, or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service."

"SECTION 22. Whenever the Commission shall be of opinion, after a hearing had upon its own motion or upon complaint that the rates, fares or charges or any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the Commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the Commission shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The Commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the Commission such authorization is consistent with the public interests, and the Commission may from time to time modify or revoke such authorization."

"SECTION 23. Whenever the Commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the Commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed,

and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby."

"SECTION 26. Every order of the Commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served under the laws of this Commonwealth. It shall be the duty of every person and corporation to notify the Commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification shall be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the Commission every person and corporation upon whom it is served shall, if so required in the order, notify the Commission in like manner whether the terms of the order are accepted and will be obeyed. Every order of the Commission shall take effect at a time therein specified and shall continue in force either for a period which may be designated therein or until changed or abrogated by the Commission."

"SECTION 27. The Supreme Judicial Court shall have jurisdiction in equity to review, annul modify or amend any rulings or orders of the Commission which are unlawful to the extent only of such unlawfulness. The procedure before the said Court shall be that prescribed by its rules, which shall state upon what terms the enforcement of the order shall be stayed. The attorney for any party petitioning the Supreme Judicial Court hereunder shall file with the clerk of the Court a certificate that he is of opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the Court upon any such party whose

petition shall appear to the Court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. The burden of proof shall be upon the party adverse to the Commission to show that its order is invalid. Any proceeding in any court of this Commonwealth directly affecting an order of the Commission or to which the Commission is a party shall have preference over all other civil proceedings pending in such report, except election cases."

"SECTION 28. The Supreme Judicial Court shall have jurisdiction upon the application of the Commission to enforce all valid orders of the Commission and all the provisions of this Act. Whenever the Commission shall be of opinion that a common carrier subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the Commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of the law or of any order of the Commission, it shall direct counsel to the Commission to begin, subject to the supervision of the Attorney-general, an action or proceeding in the Supreme Judicial Court in the name of the Commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions."

"SECTION 29. This Act shall be deemed and construed as a remedial Act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the Commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this Act. Except as above provided all Acts and parts of Acts inconsistent with any provision of this Act, and all Acts and parts of Acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the Commission are hereby repealed; provided, that nothing herein contained shall be construed to repeal, directly or by implication, the provisions of chapter five hundred of the Acts of the year eighteen hundred and

ninety-seven, or to authorize the Commission to make any order or take any action inconsistent with the provisions of said Act or with any rights which have been acquired by any common carrier under any statute prior to the passage of this Act."

---

## EXHIBIT "B".

## SUPREME COURT, ERIE COUNTY

HENRY C. TUCKER,

PLAINTIFF

against

THE WESTERN UNION TELEGRAPH COMPANY AND THE GOLD & STOCK TELEGRAPH COMPANY,

DEFENDANTS

JAMES F. DEE, vs. same.

GEORGE H. MILLENER vs. same. Erie Special Term, June, 1915.

JAMES L. HOLLAND and JOHN MACK, vs. same.

THOMAS E. HOGAN, doing business as J. R. HEINTZ & CO., vs. same.

This is an application by the defendants to vacate a temporary injunction heretofore granted in this action restraining defendants from discontinuing to furnish to the plaintiffs quotations of the New York Stock Exchange by means of "ticker" and "fast wire" service.

The New York Stock Exchange, although not a party to this action, was represented by counsel on the argument.

*Messrs. Hoyt & Spratt, Attys. for Defts.*

*Mr. Rush Taggart, of counsel for Defendants.*

*Mr. John G. Milburn, counsel for Stock Exchange.*

*Mr. Simon Fleischmann Atty. for Plffs.*

*Messrs. Norton, Penney, Spring & Moore, Atty. for Plffs.*

Pooley, J.

The complaint alleges, and the answer admits, that the plaintiff has for a long time past, and now is engaged in the business of dealing in shares of stock, securities and commodities and for that purpose has maintained an office in the City of Buffalo; that the defendant, Western Union Telegraph Company, is a domestic public service telegraph corporation, under the laws of the State of New York, and has assumed the obligation to render equal service to the public, for just and reasonable rates, without favor or discrimination, and that it maintains and controls and operates various lines of telegraph throughout the United States, and between the Cities of New York and Buffalo, by means of which it transmits messages, news, reports and other divers forms of information; that the defendant, The Gold and Stock Telegraph Company, is a like domestic public service telegraph corporation, controlled by the Western Union Telegraph Company, and that all of the business of the Gold and Stock Telegraph Company is the business of the Western Union Telegraph Company; that the Western Union Telegraph Company is engaged in transmitting quotations and prices at which divers sales and purchases of bonds, stocks and commodities have been made upon the various Exchanges and Boards of Trade in the various cities throughout the United States, and among others, the purchases and sales of stocks and bonds upon the New York Stock Exchange, and that the Western Union Telegraph Company transmits the said quotations over its telegraph lines for the purpose of distributing the same to persons and corporations who subscribe for such service, and takes the compensation fixed therefor by it; and that it distributes such quotations to its various subscribers by means of a direct telegraph

wire, referred to as the "fast wire," to the place of business of the subscriber, and also by means of "tickers" placed in such place of business, which said "tickers" are operated through the Western Union Telegraph Company; that the defendants have a fixed rate for such service in the City of Buffalo, N. Y., of thirty-five dollars per week for "fast wire" service, and the sum of six dollars per week for "ticker" service, and that said defendants are furnishing such service to a large number of subscribers in said City of Buffalo, N. Y.; that for a long time past the plaintiff has been and now is a subscriber for the New York Stock Exchange quotations, and that the defendants have furnished the plaintiff with said quotations, by means of said "fast wire" and "tickers," and that the plaintiff, has, at all times, promptly paid the regular and fixed rate for said service, and, in all respects, complied with the reasonable rules and regulations of the defendants.

The complaint further alleges that notwithstanding that the plaintiff has paid to defendants in advance for said services and had complied with all reasonable rules and regulations of the defendants, and is willing to do so in the future, the defendants, without cause and without notice, and with intent to discriminate against the plaintiff, and to injure him in his business, has determined to cut off such service to the plaintiff; that the plaintiff has demanded a continuance of such service, and has informed the defendants that he is willing and financially able to pay the regular compensation therefor, and that he will comply with all reasonable rules and regulations of the defendants in relation to its use, but that the defendants unlawfully and wrongfully refuse, and have refused, to continue such service, although such service will be continued by defendants to divers and various other persons and subscribers in the City of Buffalo, and elsewhere in the State of New York and the United States.

The defendants aver that said quotations, particularly the quotations of purchases and sales of stocks and

bonds upon the New York Stock Exchange, are transmitted under and by virtue of the provisions of a written contract between the New York Stock Exchange and the defendant, Telegraph Company.

They admit that subject to the provisions of said contract, the Western Union Telegraph Company transmits said quotations and distributes same to such persons and corporations as subscribe for such service, and pay the compensation required therefor, under the conditions of the said contract under which the "tickers" are operated by the Western Union Telegraph Company, but deny that they are required to furnish such quotations by means of said "tickers" service, or otherwise than as set forth in said contract.

They admit that the rates for said "tickers" service and "fast wire" service for the quotations of the New York Stock Exchange are uniform and fixed, and that subscribers are entitled to receive the same under the provisions of said contract, and that the rate for said "fast wire" service in the City of Buffalo is thirty-five dollars per week, and the rate for the "ticker" service is six dollars per week.

They admit that they have been furnishing such "ticker" service to a number of subscribers in the City of Buffalo, N. Y., and admit that the plaintiff has been a subscriber for the quotations of the New York Stock Exchange, and has been furnished by the defendant, Western Union Telegraph Company, with said quotations by means of said "ticker" service, and said "fast wire" service, and that the plaintiff has heretofore paid the fixed rates for said service, and has complied with the regulations of the defendant, Western Union Telegraph Company, but deny, that without cause and without notice and without intent to discriminate against the plaintiff, and to injure him in his business, they determined to cut off said "ticker" service, and deny all of the other allegations in the eighth paragraph of the plaintiff's complaint, save the allegation that said "ticker" service will be continued to other persons and subscribers in the City of Buffalo, N. Y., and elsewhere in the United States,

under and subject to the provisions of the defendant's contract with the New York Stock Exchange. The defendants then set forth, at length, their several contracts with the New York Stock Exchange, and allege that by virtue of a contract now existing between the defendants and the New York Stock Exchange, all applicants for continuous quotations of the New York Stock Exchange must be approved by the New York Stock Exchange before the Western Union Company can furnish the quotations desired by said applicants.

It will be seen, therefore, that substantially all the facts alleged in the complaint are admitted, excepting the charge that the Telegraph Company wrongfully refuses to furnish the service; and the defendants allege in substance that they refuse the service because the Stock Exchange has not approved the plaintiff's application, and that the Telegraph Company is bound by its contract, not to furnish the service to the plaintiffs.

The issues therefore narrow down to the propositions, first, that the Stock Exchange has an absolute property right in the quotations collected and compiled by it; second, that under the contract of July 1, 1914, between the Exchange and the Telegraph Company, the relation of sender and carrier of messages exists, and that to require the Telegraph Company to furnish these quotations to others than those approved by the Stock Exchange, would compel a violation of Sec. 552 of the Penal Law.

As to the first proposition, that of an absolute property right in the quotations, there can be no doubt.

*Christie Grain & Stock Co. vs. Bd. of Trade of Chi. 198 U. S. 236.*

*Hunt vs. N. Y. Cotton Exchange 205 U. S. 322.*

As to the second contention, that of the relation of sender and carrier, and of a violation of Sec. 552, of the Penal Law, I cannot agree. Sec. 522 contemplates

a person who wrongfully obtains or attempts to obtain any knowledge of a telegraphic message by connivance with a clerk, operator, messenger or other employee of a Telegraph Company, or being such employee wilfully divulges the contents of a message. It is obvious that this has reference to messages as generally understood, and no doubt would apply to messages sent over private, direct wire or received privately from a ticker or other instrument. But the service under discussion is distinct from the ordinary and commonly accepted duty of receiving and delivering messages, and is one which has grown up to meet the demands of business, the quick transmission of market conditions to all parts of the country. The value of the service is not in its secrecy, but in the publication of the information as soon as it is available. The office of a broker who has the service is practically a public one, and once the quotation is received it is practically open to anyone who desires it. It cannot be said therefore that the Penal Law is violated by such publication. Publicity of the quotation is of the first importance. While trading at the Exchange between members and their representatives on the floor may be extensive, it is a matter of common knowledge that a very large part of the business comes from brokers at remote points, whose patrons are obliged to depend upon market conditions disclosed by these quotations of actual dealings on the floor. It is because of this service furnished at frequent intervals, that traders in distant cities are informed of the trend of the market and enabled to determine upon their action. The provinces of the Exchange is that of affording facilities to buy and sell, and it is manifestly to its own interests that the buying and selling public know the market conditions. The nature of the business is such that operators prefer to deal with responsible brokers at their home cities rather than to attempt to trade with members of the Exchange direct, and in order to do this they must have the information necessary to the determination of their orders. So this system has grown to its present

proportions, and requires the co-operation of the Exchange, the Telegraph Company and the brokers in furnishing to patrons the facilities required. In the nature of things, the business cannot be private and secret, but must be public and instantly available to all. The question here presented is somewhat different from that involved in the sending and carrying of a message. The Telegraph Company is a corporation formed for the purpose of transmitting messages, and the statute under which it exists in this state requires it to perform this service with impartiality and good faith, aside from any requirements under the Public Service Commissions Law. The Stock Exchange is a voluntary association, having a private office to which none but members are admitted, and here they meet daily and buy and sell bonds, stocks, etc., as opportunity is given by means of oral offers and bids. The members of the Exchange operate, not only on their own account, but as representatives or agents of persons not members, and located in all parts of the country. To facilitate the business, it became the practice to make note of the fluctuations in the bids and offers on the floor and members were able to send this information to their customers wherever they might be, by messenger, by post or by telegraph, the latter being the means principally used for obvious reasons. The evolution of the business resulted in the ticker, a machine, automatic in its essential features, and the telegraphic equipment was so improved and enlarged that any number of tickers could be operated at the same time wherever located. The ticker is the property or under the control of the Telegraph Company. The growth of the business and the facility of communication caused the establishment in remote cities, of offices where correspondents or customers of members of the Exchange received immediate information by means of the ticker, and it became the practice to post the information on black boards so that any person might be informed of transactions occuring on the floor of the Exchange, practically as soon as known there. The business

on the floor of the Exchange, by these facilities increased to large proportions, and was so productive that the Exchange, instead of its business being confined to individual operations of its members, permitted employees of the Telegraph Company to come in upon the floor, make note of the transactions and transmit the information broadcast throughout the country. The new development in the brokers offices resulted, and by contract with the Telegraph Company the brokers had tickers installed in their offices, giving to the public the quotations of all transactions on the floor of the Exchange, by means of which business could be done anywhere with practically the same facility as that of a person on the floor of the Exchange. Assuming that the expense of obtaining this information was only the compensation of its employes who gathered it, the Telegraph Company profited by the rental or sale of the tickers and furnishing the quotations, and also in procuring the business of the return communications by wire between the brokers throughout the country, and the operators on the floor of the Exchange. It soon became manifest that these quotations were valuable property which should yield a profit to the Exchange. The Telegraph Company's employes were excluded from the floor, and the Exchange itself, through its own employes, collected and collated the quotations and delivered them to the Telegraph Company for transmission to its customers who had tickers installed. The business is in no manner changed. The Telegraph Company receives the same quotations and distributes them in the same manner as before; the only difference is that now the Exchange collects and collates them, and delivers them to the Telegraph Company.

It may be assumed that there is no restriction placed upon any member of the Exchange as to the volume of his transactions on the floor, and it may also be assumed that no member would refuse to fill any legitimate offers of business. A broker therefore, wherever located, would be able to arrange for the fillings of his orders on the floor of the Exchange.

The more orders received, the greater volume of business and the greater income to the member of the Exchange and to the Telegraph Company which furnished the information on which to deal, and the quick means of communication between the broker and the member on the floor.

If the elements of the business were all embraced in the matters above outlined, it might be urged that the brokers were the agent of the members of the Exchange in procuring business, and through arrangements definitely made, the Exchange on behalf of the member sending to the brokers, by means of the Telegraph Company, private information to enable them to do business, the Telegraph Company would therefore be bound to deliver this information to the persons and to them only, whom the member of the Exchange should designate; the messages would be like ordinary messages, subject to secrecy. Whether they were sent in the common yellow envelope or were transmitted through the means of the ticker would make no difference.

But this is not the situation presented by this case. If it were, the Exchange would pay the Telegraph Company for every message so sent, at rates common to all, while the fact is the Telegraph Company pays the Exchange a large sum, presumably not a gift, but a payment made for the purpose of acquiring something. If it were the business of sender and carrier, the Exchange would seek the agents, assume the work and charge for installing the tickers, while the fact is, the Telegraph Company has the responsibility of securing the patrons, installing the equipments and collecting the cost.

If this were the ordinary business of transmitting messages the Telegraph Company would not pay the Exchange, nor would it contract to do the business for the gross sum, because it is bound to charge uniform rates to all as the messages are presented for transmission. The information is received over the ticker and retained privately by the broker, might properly be restricted. In the nature of things this would be of

comparatively little value. A broker receiving quotations which he was bound not to publish would of necessity be obliged to do business with each individual customer, disclosing to him information required in the particular case. It is a matter of common knowledge that this is not and cannot be the method of doing business. The persons desiring to trade, want all the information available and at once. It is not generally the case of an individual going to his broker's office intent upon buying or selling a predetermined commodity, as he would go to the market to buy his household supplies. It is rather that of a trader ascertaining general conditions, and by reason of his shrewdness, sizing up the business situation, availing himself of an opportunity, to make a profit. The Exchange does not criticise this publication by brokers doing legitimate business.

The quotations are in no sense secret communication. They would be well nigh worthless to the trading public if kept secret. Their value is measured by the publicity given them. This is manifest from the fact, that immediately a transaction is made, it is quoted and transmitted to all having the tickers to receive it, and it in turn is immediately posted and published to the world. This is the means by which the broker, and through him the member of the Exchange obtains business. Now the Telegraph Company is the intermediary essential to the transaction of a great volume of business in the Exchange. It could stand strictly upon its statutory duty to furnish impartial service in the transmission of all messages tendered. When the manifolding of the delivery by means of the ticker or any other device to facilitate the transmission became known, it could with propriety secure such devices and offer the same on equal terms to all patrons according to the nature and extent of the service required. If the Exchange or its members desired to extend their business by establishing agencies in the cities outside of New York, it would be their concern and not that of the

Telegraph Company. The Telegraph Company would have the right to refuse to transmit it except on the basis of ordinary messages or any other means whereby equal and impartial service was rendered.

It is deemed expedient, however, to enter into an arrangement whereby the Exchange collects the quotations, delivers them to the Telegraph Company to be distributed to its patrons, and for this the Telegraph Company pays the Exchange a large sum in money. No question is raised, although it might be, as to whether or not the Telegraph Company has not gone outside of its corporate powers in paying large sums of money for news to be transmitted broadcast; but assuming that it is within its rights, it is urged that it cannot legally acquire property or rights in property to be utilized in such a way as to refuse facilities to all citizens.

It is part of this "service" which the Telegraph Company renders through its facilities and under its charter and which it must render with impartiality and in good faith.

*National Tel. Trans. Co. vs. W. U. Tel. Co. 119. Fed. 294.*

It seems to me clear that the service in question is not that of transmitting messages for hire, but that it is that of purchasing rights in information, made valuable by its publication; and assuming that the Telegraph Company has the right to make such purchase, it has not the right to do so unless it has also the right to dispose of it on equal terms to all who may legally require it. But it appears that the information received and transmitted, might be and probably has been used unlawfully, in gambling transactions and in so-called bucket shops where the transactions were not bona fide, and the Exchange, desiring to prevent such transactions, determined to control the business to the extent of requiring the Telegraph Company to refuse the service to any one making unlawful or improper use of it. No criticism can be made

of this action. It was and is the duty alike of the Exchange and the Telegraph Company to so act. This appears from the record to be the only control that the Exchange has ever claimed to exercise, once the quotations are delivered to the Telegraph Company, and it is specifically so stated in the contract. It is true that the contract also provides that the patrons of the Telegraph Company to receive the service must be approved by the Exchange. But what is the purpose of the approval? Manifestly it is to meet the one objection, that of furnishing the service for unlawful or improper purposes. The Exchange in the circumstances here shown, cannot under this contract claim the right arbitrarily to deprive a broker doing a legitimate business, of the facilities offered by the Telegraph Company, nor can it so restrict the Telegraph Company.

The plaintiffs here have for years had this service and paid for it, and are prepared to pay for it in the future and to conform to all reasonable regulations. It is not claimed that they or either of them have ever used or contemplated using this service for unlawful or improper purposes, or otherwise than in accord with the regulations proposed.

The Stock Exchange has the right to refuse to give the quotations. The Telegraph Company may have the right to refuse to furnish the quotations to any one, although it well may be contended that all its facilities are subject to public control, and that it might in the public interest be compelled to utilize them. But with the Exchange giving the information to the Telegraph Company, knowing that it is to be delivered to various patrons, does it not thereby submit it to the control of the public through its Public Service Commissions Law? The Telegraph Company must conform to these regulations, giving equal and impartial service to all requiring it who conform to the legal requirements. It is apparent that a patron who violates any of the requirements may justly and legally be deprived of the service, but there is no intimation that either of these plaintiffs is charged

with any violation, and it appears that for a number of years they have enjoyed this service, have conformed to its requirements, have paid for it, and are prepared to pay for it in the future.

The Stock Exchange and the Telegraph Company have the right to restrict the service to lawful and proper use, and it appears from the contract that it was intended to so restrict it; but to go farther and undertake to grant to one and refuse to another equally entitled, would constitute an unlawful discrimination. The contract provides: —

> "11th. It is understood and agreed that as to the right of the Exchange — to disapprove applications for quotations — it is the intent only to prevent the unlawful and improper use of such quotations."

There being no claim that plaintiffs have made or will make any unlawful or improper use of the quotations, they cannot arbitrarily be refused the service so long as it is furnished to others in like business. The Telegraph Company is interested in this interpretation of the contract. It pays a large price for the quotations and can only make the service profitable by contracting with a large number of patrons. If the Exchange has the power to restrict the use of the service by refusing these five patrons, it may refuse the service to all the patrons in Buffalo after the Telegraph Company had gone to the expense of extending its wires, and installing its instruments. It seems to me clear that when by its contract, the Exchange says that "it is the intent *only* to prevent the unlawful and improper use of such quotations," it has reached its legal limit if the service is to be given at all, and the burden is upon it to show, a violation of the terms and conditions if it undertakes to deprive a patron of the service.

It is true that the Exchange has the right to refuse to disclose any of the information collected; and it has been held that it being private property it could limit its sale as it chose; but the information is sold for a substantial price to the Telegraph Company and

becomes its property, subject to any legitimate restrictions. It could not, if it would, prevent its publication, once it is given to any broker and posted on the bulletin or blackboard. It is published to the world and if given to one there is no good reason why any other, doing a lawful business, should be precluded from receiving it on equal terms. The quotations being valuable property and subject to sale, the ordinary rules regarding property apply. The title passes from the Exchange upon delivery and becomes vested in the Telegraph Company, and the Telegraph Company sends the quotations broadcast to brokers who immediately publish them to the world. They are beyond the control of the Exchange immediately upon delivery to the Telegraph Company. It is true that the word "sale" is not used in the contract, but all the elements of a sale are present, delivery of valuable property, and the payment of the consideration price. There is nothing peculiarly secret or sacred in these quotations, and there is no substantial reason why they should be treated differently than any other kind of personal property. The Exchange might retain control by contracting directly with the brokers and then would be entitled to limit the number of its agents. The quotations would be sent through the Telegraph Company by the same means as now, but there would be no reason why the Telegraph Company should pay anything; on the contrary the Telegraph Co. would be relieved of the payment of the sum now agreed to be paid, and would receive full legal compensation for services rendered. The defendant contends that its position is sustained,

*In Re, Renville 46 A. D. 57.*

In that case the Court refused a mandamus to compel the Telegraph Company to furnish petitioner with quotations of the Exchange in the same manner as furnished to others. This decision was made in 1899 before Telegraph Companies within the Public

Service Commissions Law. It does not appear that the applicant in that case conformed to the reasonable rules and regulations, nor that the respondents were not acting within their rights in refusing the service.

Under the Public Service Commissions Law these defendants are prohibited from charging, collecting or receiving a different compensation for any service rendered than the charge applicable to such service as specified in its schedule on file and in effect, and from refunding or remitting directly or indirectly any portion of the rate or charge so specified (Article 5, Sec. 92.)

The law also provides that every Telegraph corporation shall print and file schedules showing "all rates, rentals and charges per service of each and every kind."

The conclusion reached here does not conflict with the law of the Renville case applied under then existing conditions. It appears in that case (P. 43) that "this private voluntary association (The Exchange) being thus in control of its own property, and having the absolute right to give information as to the dealings of its members with each other to whom it pleases, and upon such conditions as it pleases to impose, gives certain information to the defendants to be delivered to certain specified persons, and upon condition that the defendants give such information to such specified individuals and none other."

It appears that by the agreement between the Exchange and the Telegraph Company then in force, the Telegraph Company had the right (P. 41) "to serve said reports to all persons, firms, corporations and organizations in New York City and elsewhere — except to persons who may be directly or indirectly engaged in the promotion or maintenance of 'bucket shops' ".

It thus appears that the purpose of the restrictions was to prevent the furnishing of quotations to bucket shops; that the Exchange retained control of its own property, and specified the person to whom it should be delivered. It would seem that it would be nearer

correct if it stated the persons to whom it should not be delivered. In the present case the Exchange does not specify any persons whatever. It delivers the property for value to the Telegraph Company, with the only legal restriction that the Telegraph Company shall not specify any persons engaged in promoting bucket shops. The Telegraph Company has specified these plaintiffs, who are entitled to the presumption that they are not in the prohibited class, and moreover it is alleged and not controverted that they are not in the business of promoting bucket shops.

The provisions of the Public Commissions Law is analogous to the Interstate Commerce Act, and decisions under the latter are instructive.

*In L. & N. R. R. vs. Motley, 219 U. S. 467.* The railroad company, an interstate carrier, contracted with Motley that in consideration of a release of a claim for damages, it would issue annual passes for life to Motley and his wife. Subsequently the Interstate Commerce Act was passed prohibiting different compensation for transportation than that specified in its published tariffs or rates, and the railroad company refused to furnish the passes. The Court held that while the contract for the passes was valid when made, by subsequent legislation such contract was unenforcible. So here, if a pre-existing contract valid when made, is rendered unenforcible by legislation, a contract to restrict the performance of the requirement of equal service is also unenforcible, and the quotations once they are delivered to the Telegraph Company are subject to the rule of equal service to all who conform to the reasonable regulations and pay the uniform charges.

It is urged by defendants that if plaintiffs have any right or complaint, their remedy is by application to the Public Service Commission under Sec. 97 of the law, but the citizen whose private rights, capable of enforcement in the courts are involved, are not confined to an application to the Commission, when in the meantime his business is greatly if not totally interferred with,

and the relief by injunction is the only remedy adequate to the situation. The injunctions are continued until the hearing and determination of the actions.

Affirmed by Appellate Division 155, N. Y. Sup. 1108.

State of New York, ss. Court of Erie.

Seal

IN WITNESS WHEREOF, I have hereunto set my hand and affixed this seal of said County and Courts, at Buffalo, this 8th day of July, 1915.

No. 6843.
M. J. N.
7-7-15

Revenue Stamp

S. A. NASH,
Clerk.

I, Simon A. Nash, Clerk of the County of Erie; and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of OPINION with the original thereof, entered and on file, in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

## EXHIBIT "C"

## DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

No. 738.

HENRY G. S. NOBLE on behalf of the NEW YORK STOCK EXCHANGE

PLAINTIFF.

*v.*

CALVIN H. FOSTER; the WESTERN UNION TELEGRAPH COMPANY, and FREDERICK J. MACLEOD, et als, as members of the PUBLIC SERVICE COMMISSION OF MASSACHUSETTS.

DEFENDANTS.

## EXTRACT FROM THE OPINION OF MR. JUSTICE DODGE,

filed December 19, 1916.

"Discrimination without just cause on the part of a Telegraph Company is forbidden both by the Massachusetts law and by the Acts of Congress regulating Interstate Commerce. The plaintiff (New York Stock Exchange) after allegations setting forth in some detail the method followed by it in transmitting these quotations from New York to the Telegraph Company in Boston, and by the latter in distributing them to its own customers in Boston claims in Par. 10 of its bill that the said transmission and distribution is Interstate Commerce which Congress alone has power to regulate, that Congress has vested in the Interstate Commerce Commission exclusive jurisdiction of all proceedings, suits or actions affecting or controlling the distribution of said quotations, and that the Massachusetts legislation establishing the said Public

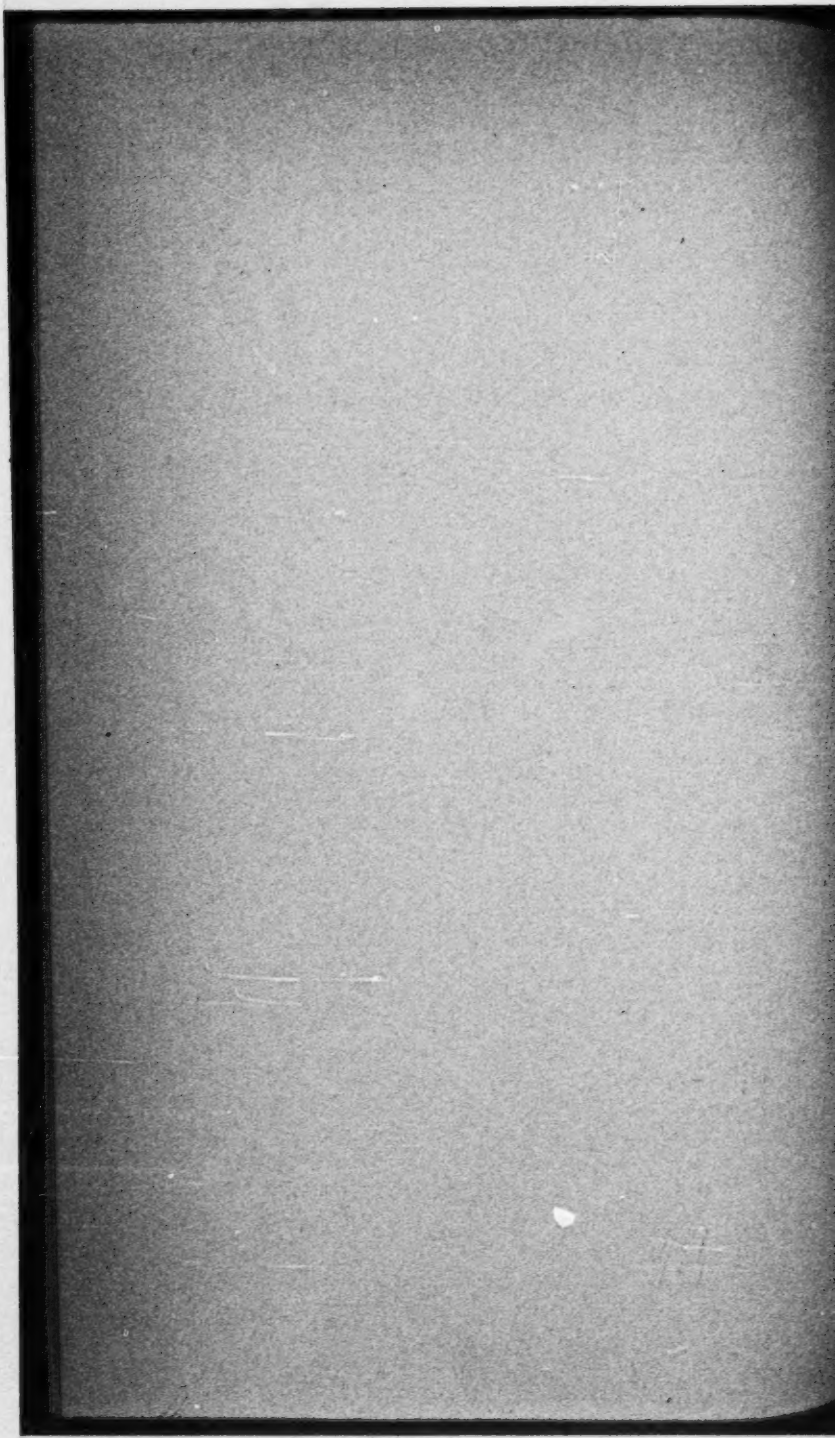
Service Commission with jurisdiction to hear complaints respecting the distribution of said quotations, the Commission's order directing the delivery of said quotations to said Foster, and the order of the State Court confirming the order of the Commission are all of them void."

"If this claim can be maintained and if it can be said that the order requiring discontinuance of the unlawful discrimination deprived the plaintiff of any property right belonging to it, it was not so deprived without due process of law, but by a Commission and a Court with power to act in the matter."

"The same facts in substance as the plaintiff has alleged here in support of its above claim, appear to have been brought before the Massachusetts Court upon the Telegraph Company's petition to review the State Commission's Order. *Western Union Telegraph Co. vs. Foster*, above cited, 224 Mass. 365. The present plaintiff (New York Stock Exchange) was not made a party in that case, and the Court held that it was not a necessary party; but in the facts alleged by it here, I find nothing to distinguish this case from that there considered, so far as the present question is concerned. Upon full and careful consideration it was there held that the Interstate Commerce Acts did not apply to or cover the local distribution of these quotations, bought by the Telegraph Company in interstate commerce, but delivered by it in intrastate commerce under the circumstances disclosed. With this conclusion and the reasoning of the Court in support thereof, I agree. While transmission of the quotations from the plaintiff in New York to the Telegraph Company in Boston was governed by the Interstate Commerce Acts, none of the arguments relied on to show that those Acts also continued to govern their further transmission by the Telegraph Company from Boston to applicants for them in Massachusetts seem to me adequate for the purpose, in view of the rights in them passing under the contract to the Telegraph Company, as above. I therefore consider the facts alleged in the Bill insufficient to warrant the plaintiff's

claim that the State legislation was inapplicable and the State authorities without jurisdiction."

The motion is therefore granted and there may be a decree dismissing the bill."



MAR 18 1918
JAMES D. MAHER,
Clerk.

SUPREME COURT OF THE UNITED STATES

October Term, 1917.

No. 274

THE WESTERN UNION TELEGRAPH COMPANY AND THE UNITED TELEGRAM COMPANY

*vs.*

CALVIN H. FOSTER AND FREDERICK J. McLEOD ET ALS

No. 275

THE WESTERN UNION TELEGRAPH COMPANY AND THE UNITED TELEGRAM COMPANY

*vs.*

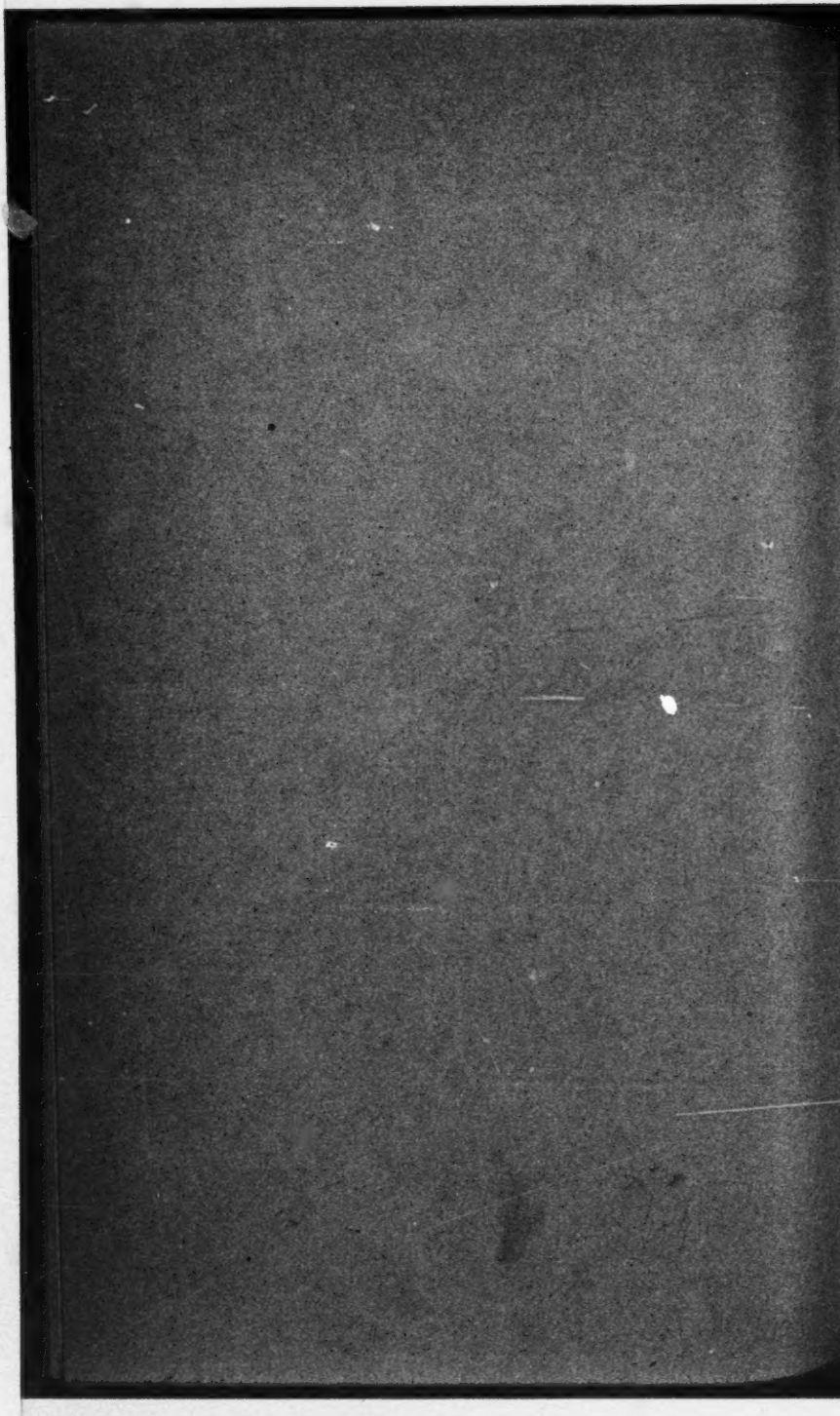
FREDERICK J. McLEOD ET ALS, MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

On Writ of Error to Supreme Judicial Court for the Commonwealth of Massachusetts

# BRIEF FOR CALVIN H. FOSTER

DEFENDANT IN ERROR

PATRICK HENRY KELLEY
Attorney for
CALVIN H. FOSTER



## INDEX TO SUBJECT MATTER

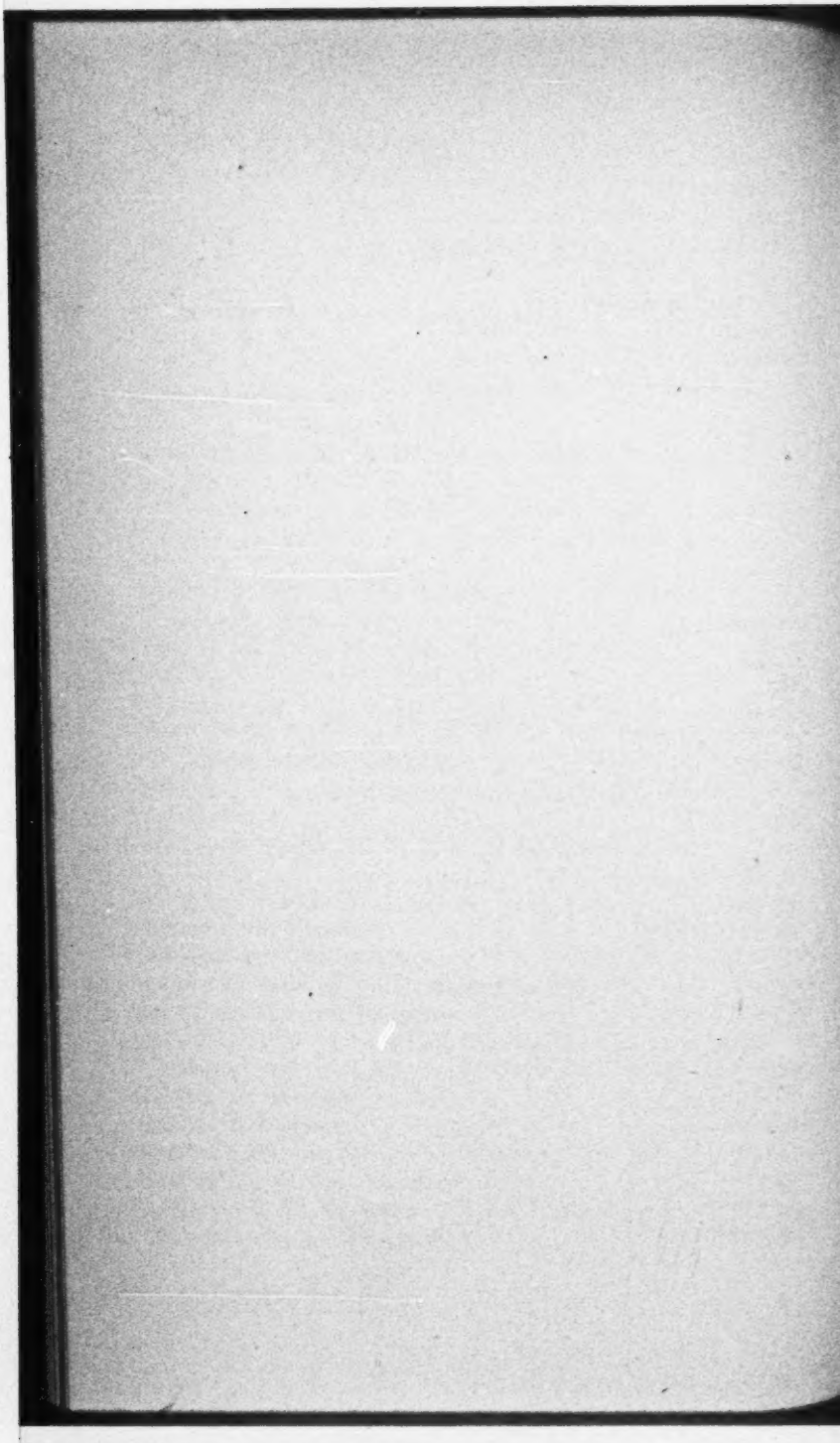

| | PAGE |
|---|---|
| Preliminary Statement | 1 |
| Statement of Case | 2 |
| Facts Found by Public Service Commission's Report | 3–12 |
| Order of Public Service Commission | 12 |
| Assignments of Error | 13 |
| Due Process of Law Issue | 13–21 |
| Interstate Commerce Issue | 22 |
| Point Two. Telegraph Company not acting as a Common Carrier of Messages | 22–24 |
| Point Three. The Telegraph Company's Business of Distributing Quotations is Intra-State Business | 25–30 |
| Point Four. No Federal Question open on the Record | 31–33 |
| Point Five. Interstate Commerce Commission had not Jurisdiction of Foster Suit | 34–39 |
| Point Six. State Court had Jurisdiction of Foster Suit | 40–42 |


## INDEX TO CITATIONS


| | |
|---|---|
| Atlantic Coast Line R. R. Co. vs. Glenn | 28 |
| American Steel & Wire Co. vs. Speed | 28 |
| Austin vs. Tennessee | 27 |
| Baccus vs. Louisiana | 24 |
| Brown vs. Houston | 27 |
| Central Land Co. vs. Laidley | 20–21 |
| Chesapeake & Ohio R. R. vs. Kentucky | 33 |
| Chrisman vs. Miller | 26 |
| Cooley vs. Board of Wardens | 30 |
| Cross Lake F. & S. Club vs. Louisiana | 20–21 |
| Diamond Match Co. vs. Ontonagon | 28 |
| Egan vs. Hart | 26 |
| Erie R. R. Co. vs. Purdy | 33 |

PAGE
General Oil Co. vs. Crain ..... 28
Hall vs. Geiger Jones Co. ..... 28–29
Hennington vs. Georgia ..... 32
Hopkins vs. U. S. ..... 28–29
Illinois Central R. R. Co. vs. Mulberry Hill Coal Co. ..... 28
Interstate Commerce Commission vs. Chicago G. W. R. Co. ..... 36
Kehrer vs. Stewart ..... 28
King vs. West Va. ..... 26
Knox vs. Exchange Bank ..... 20
Lake Shore & M. S. R. Co. vs. Ohio ..... 33
Langdon vs. Pa. R. R. Co. ..... 37
Louisville, M. O. & T. R. vs. Mississippi ..... 32
Louis & N. R. R. Co. vs. F. W. Cook Brew. Co. 38
May vs. New Orleans ..... 27
Missouri, Kan. & Tex. Railway Co. vs. Harris .. 28
Minnesota Rate Cases ..... 30
Morley vs. Lake Shore R. R. Co. ..... 30
Mo. R. & T. Co. vs. McCann ..... 33
Mutual Film Co. vs. Industrial Com. ..... 27–28
New York, N. H. & H. R. R. Co. vs. Interstate Commerce Commission ..... 35–37
New York Stock Exchange vs. Calvin H. Foster et als ..... 20
Northern Pacific R. R. Co. vs. Larrabee Flour Mills ..... 28–41
Northern Pacific R. R. Co. vs. Messe ..... 24–30
Osborne vs. Florida ..... 33
Overton vs. Oklahoma ..... 33
Pacific R. R. Co. vs. Puritan Coal M. Co. ..... 28
Pa. R. R. Co. vs. Knight ..... 28
Pa. R. R. Co. vs. Sonman Shaft Coal Co. ..... 41
Pittsburg and S. Coal Co. vs. Bates ..... 27
Rankin vs. Emigh ..... 26
Sim vs. Edenborn ..... 20
Southern Pacific R. Co. vs. Stewart ..... 41
St. Paul R. R. Co. vs. Todd ..... 21
St. Louis I. M. S. Railway vs Arkansas ..... 28
Stone vs. Farmers L. & T. Co. ..... 32

| | PAGE |
|---|---|
| Texas & P. R. R. Co. vs. Interstate Com. Com. | 35 |
| Tucker vs. W. U. Tel. Co. | 9 |
| Turner vs. Wilkes Co. | 21 |
| U. S. vs. Del. & Hud. R. R. Co. | 36 |
| U. S. vs. Pa. R. R. Co. | 37–38 |
| U. S. vs. Uncle Sam Oil Co. | 39 |
| Western U. T. Co. vs. Brown | 29 |
| Western U. T. Co. vs. James | 28–29 |
| Waters Pierce Oil Co. vs. Texas | 26 |



SUPREME COURT OF THE UNITED STATES

October Term, 1917

No. 274

THE WESTERN UNION TELEGRAPH COMPANY AND THE UNITED TELEGRAM COMPANY

*VS.*

CALVIN H. FOSTER AND FREDERICK J. MCLEOD ET ALS

No. 275

THE WESTERN UNION TELEGRAPH COMPANY AND THE UNITED TELEGRAM COMPANY

*VS.*

FREDERICK J. MCLEOD ET ALS, MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

## PRELIMINARY STATEMENT

In January, 1917, The Defendant in Error Foster filed a Motion to Dismiss or Affirm, upon the ground that no Federal question was presented by the Record. This Honorable Court thereafter announced its purpose to postpone its decision on the above motion until the cause was argued on the merits.

Annexed to the Brief of the Defendant in Error Foster which was filed in support of the said motion to Dismiss or Affirm, is a copy of Chapter 784 Massachusetts Acts of 1913 and also a verbatim copy of the opinion of Mr. Justice Pooley in the Case of Tucker vs. Western Union Telegraph Company which are referred to in the present brief.

## BRIEF ON THE MERITS
## STATEMENT OF THE CASE

The initial proceeding in this case was a complaint filed by Calvin H. Foster one of the defendants in error under the provisions of Chapter 784 of the Acts of 1913 of the Commonwealth of Massachusetts with the Public Service Commission against the Western Union Telegraph Company and the United Telegram Company by which it was charged that the above named telegraph companies were unlawfully discriminating against the said Foster by withholding and refusing to sell and deliver to him continuous quotations made on the New York Stock Exchange which service the telegraph companies were furnishing to others.

After the complaint was filed the telegraph companies thereafter appeared and filed their answers; the answers alleged that the telegraph companies refused to deliver the continuous quotations of the New York Stock Exchange and the Stock Ticker Service because the complainant Foster had not been approved by the New York Stock Exchange; the answers also alleged that under the contract which the telegraph companies had made with the New York Stock Exchange and which was annexed to the answers that the telegraph companies were prohibited from delivering the quotations to persons who had not first secured the approval of the Stock Exchange; that to compel the telegraph companies to furnish the said service to the complainant would thereby appropriate the property of the New York Stock Exchange to the benefit of the complainant; and thereby result in the violation of contractual rights contrary to the provisions of Due Process of Law under the Federal Constitution; and it was further alleged that the Public Service Commission was without jurisdiction over Foster's complaint, because the subject matter was within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress.

There was a hearing on the merits before the Public Service Commission and thereafter the Commission filed its report, the material parts of which are as follows:—

## STATEMENT OF THE FACTS AS ESTABLISHED AND FOUND BY THE PUBLIC SERVICE COMMISSION'S REPORT. (See Record page 7 — Case No. 274)

"This petition (of Calvin H. Foster) was filed on March 4th 1915. The petitioner asks the Commission to order the respondents, one or both of them, to install a 'ticker' or 'tickers' in his office in Boston to furnish him with the continuous quotations of the New York Stock Exchange in the same manner and for the same price as the respondents furnish them to others. A public hearing was held on April 21, 1915.

"The respondents filed separate answers (The Western Union Telegraph Company, as lessee, answering for the Gold and Stock Telegraph Company) and both asked that the petition be dismissed for the reasons."—

"FIRST, that the Commission is without jurisdiction over the subject matter of the petition, the same being within the sole jurisdiction of the Interstate Commerce Commission under the Acts of Congress."

"SECOND, that the respondents have no legal right to deliver the quotations desired to persons other than those approved by the New York Stock Exchange, as provided in the Contract which each of the respondents has with the exchange."

"In his petition Mr. Foster alleges that he has been engaged continuously in the stock brokerage business in Boston for about twenty-five years; that during all that time until the latter part of December, 1914, he had tickers furnishing him with the quotations of both the New York and Boston Stock Exchange; that in December, 1914, the tickers furnishing him the New York Quotations were removed; that he has been unable since then to secure this service; that the respondents have stated that they will not furnish the service unless the application is approved by the Committee on Quotations of the New York Stock Exchange; that he has appeared before said committee in New York on two separate

occasions and has given full particulars in regard to his business, answering every question asked; that, so far as he knows, said Committee has not yet taken action on his application; that he has been an approved correspondent of a member of the New York Consolidated Stock Exchange since the year of 1907 and is now a member of that Exchange; that, in conducting his business, he has always complied with the laws of this Commonwealth; that he doesn't desire the quotations and service for any unlawful or improper use, but for use in his legitimate brokerage business in Boston and that his business will suffer irreparable damage if he is unable to procure them."

"These allegations were not denied by the respondents. They stated, however, that the New York Stock Exchange had notified them that the petitioner's application had been disapproved but did not furnish the Commission with the reason for such disapproval. It appears that the petitioner's office is within the district supplied by the respondents with said quotations and service and that he is ready and willing to pay the same price that the other patrons of the respondents pay and to comply with all reasonable rules and regulations applying thereto. It does not appear that the respondents, or either of them, have questioned the right of the New York Stock Exchange to disapprove the petitioner's applications without stating the reason or reasons therefor. Nor does it appear whether or not said Exchange was notified by the respondents, or either of them of this proceeding. The Exchange was not represented at the hearing.

"Both of the respondents are foreign corporations. The Gold and Stock Telegraph Company was organized in August, 1867, under the laws of the State of New York, for the purpose of constructing, using, maintaining, owning and operating telegraph lines;— Its business is the establishment and operation of plants, or what are generally known as 'Stock telegram systems' in various communities both within and without the State of New York, for the transmission and selling and furnishing of stock quotations and other market news. The United

Telegram Company was organized in 1890 under the laws of the State of New Jersey. The objects for which it was formed are 'To receive and distribute stock market and other quotations and news reports of various kinds and the performance of general district messenger service, all of which is to be carried on out of this State (New Jersey).' The principal office or place of business out of New Jersey is given in the certificate of incorporation as 'The City of Boston, Suffolk County, Commonwealth of Massachusetts.' Both of the respondents have established 'Stock telegraph systems' in Boston for the transmission of, and have carried on in Boston the business of selling and furnishing stock and other market quotations."

"Each of the respondents has a main office (in Boston) where there are certain electrical appliances with a keyboard attachment. These appliances are connected by a system of wires and cables, running under and across the public ways of the city, with the 'Ticker' instruments in the offices of the patrons. The quotations to be distributed are delivered into the main office (in Boston) and forthwith an employee, operating the keyboard causes them to be written simultaneously, by means of the so-called 'Ticker' instruments, upon a tape of paper in the office of every patron where they can be easily read. The quotations of the New York Stock Exchange are delivered at the main office of the United Telegram Company (in Boston) over a wire of the Postal Telegraph Cable Company. They are delivered at the main office of the Gold and Stock Telegraph Company over a wire of the Western Union Telegraph Company."

"On December 14, 1881, as it appears, the Gold and Stock Telegraph Company leased all of its plants, or 'Stock telegraph system,' both within and without the Commonwealth, for the term of ninety-nine years to the Western Union Telegraph Company, a New York Corporation. Since January 1, 1882, the Western Union Telegraph Company has carried on the business in Boston formerly carried on by the Gold and Stock Telegraph Company, and has carried it on in the name of the Gold and Stock Telegraph Company, as it has authority to do under the lease.

"The New York Stock Exchange is a voluntary association, limited to 1100 members, furnishing facilities to its members for the transaction of the business of buying and selling stocks and bonds. It is now the largest market for securities in this country, if not in the world, and its importance in the economic system can hardly be exaggerated."

"The knowledge of the prices made in transactions on the Exchange has become of great commercial value in the business life of the country in general, and companies such as the respondents, exist for the purpose of disseminating or distributing this information. It is indeed, a matter of general knowledge that the transactions and prices quoted on the New York Stock Exchange evidence the market or current value of the stocks and securities listed there and that these quotations are not only a commodity in common use but are of vital importance to those engaged in the business of dealing in these stock securities."

"The dissemination and distribution of these quotations is not a favor to the public granted by the Exchange. It is, and has been from the beginning, a matter of business, a service rendered which is productive of profits. For some years the members of the Exchange were apparently satisfied, as compensation for these quotations, with the enhanced profits which they doubtless derived from the increased transactions in the listed securities which the wider dissemination of the quotations by the ticker companies caused; and they allowed the reporters and employees of these companies on the floor of the Exchange for the purpose of collecting the quotations. This policy, however, was changed in 1892. In that year the Exchange decided to collect the quotations itself and to make a charge for them. On November 19, 1892, it made its first contract with the Western Union Telegraph Company, which acted for itself and as lessee of the Gold and Stock Telegraph Company, whereby it agreed to collect and furnish the quotations to the Telegraph Company for the sum of $27,000 per annum, and further agreed that the Telegraph Company should have a monopoly of the quotations through-

out the whole country except in Boston and in a prescribed area in New York City.

The contract with the Exchange referred to in the answer and relied upon by the Gold and Stock Telegraph Company acting through its lessee, the Western Union Telegraph Company, is dated October 1st, 1914. So far as they are material in this case, the provisions of these two contracts are similar. In the one between the Exchange and the Western Union Telegraph Company acting for itself and as lessee of the Gold and Stock Telegraph Company, the Exchange agrees, at its own expense, to furnish the Telegraph Company full and continuous quotations of prices made in transactions upon the Exchange, for which quotations the Telegraph Company is to pay $50,000 per annum; and the Telegraph Company may retail or furnish said quotations to any persons, whether a member of the Exchange or not, anywhere in the United States or Canada, outside a prescribed area in New York City, provided, however, that the "Telegraph Company shall not after the first day of November 1914, furnish quotations by the ticker or otherwise in the volume of a continuous service which is defined to be oftener than at intervals of fifteen minutes (and is herein referred to as continuous quotations) to any subscriber therefor unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company, and the subscriber shall be approved by the Exchange." In the contract between the Exchange and the United Telegram Company the Exchange agrees to furnish the Telegram Company the said quotations by means of the New York Quotations Company ticker installed in the office of the Postal Telegraph Cable Company, No. 18 Broadway, New York City, for which quotations the Telegraph Company is to pay the Exchange $9,000 per annum. The Telegraph Company is restricted to retailing or furnishing these quotations to subscribers in Boston. This contract contains a provision similar to the one quoted above in regard to the approval of subscribers by the Exchange."

Both contracts contain the provision that "in case

any suit or legal proceedings is brought to enjoin the Telegraph Company it shall at once inform the Exchange of such suit or proceeding and shall permit the Exchange to intervene therein, or to defend the same in the name of the Telegraph Company; but in such cases, the Exchange shall indemnify the Telegraph Company against and save it harmless from any and all costs and damages awarded against it." "It is understood and agreed that as to the right of the Exchange hereinbefore specified, to disapprove applicants for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful and improper use of such quotations."

"There is no question but that the respondents are engaged in the transmission of intelligence within the Commonwealth by electricity by means of telegraph lines," to use the language of the statute (see Sec. 2. Chap. 784 — Acts of 1913). But it is clear that this business differs in kind from the usual or ordinary telegraph business, which is transmitting messages of the public for hire, and that the duty of the Western Union Telegraph Company (Lessee of the Gold and Stock Telegraph Company) to the public in its telegraph business, as the term is usually applied, is not involved in this case."

"The Courts of this Commonwealth have not passed on the question, but it seems clear on principle that the respondents are engaged in furnishing or rendering a service for public use. The stock and other market quotations which they sell and distribute are not only convenient and advantageous to a large section of the public but are a necessity in certain important lines of business. These quotations cannot be furnished and distributed by ticker, or 'Stock telegraph system,' without the special privilege of using the public ways for the lines and cables essential to the service."

"The respondents contend that the Commission should assume that the Exchange acted in good faith and disapproved the petitioner's application on the ground specified in the contracts, to wit, that the

petitioner desired the quotations for an unlawful and improper use. It is not, however, for the Commission to make any such assumption. It is the duty of the Courts or of any regulating supervising body established by the Legislature such as the Commission is, to determine on the evidence before it whether or not unjust and unreasonable discrimination is made by persons, natural or artificial, engaged in furnishing and rendering any service for public use. It was open for the Exchange to appear at the hearing and submit any evidence it might have, if any, of the unlawful and improper use for which the petitioner desires these quotations, and we take it that the respondents promptly notified the Exchange of this proceeding, as it comes plainly within the spirit if not within the strict letter of the provisions in the contracts making it the duty of the respondents to notify the Exchange at once of any suit or legal proceedings brought to enjoin the respondents from refusing these quotations to any person. But whether or not the Exchange was notified of this proceeding the Commission must decide the case on the evidence before it. There was no evidence whatever that the petitioner desired these quotations for any unlawful or improper use. If the Exchange can, by disapproving the petitioner's application and without submitting, when its decision is called in question before proper authorities, evidence to prove that he desired the quotations for unlawful and improper use, keep the respondents from furnishing him with these quotations and ticker service, it may thus without producing any evidence cut off from receiving them any banker, broker or other persons for any reason or, indeed, without a reason. Such a power in this country is unthinkable. Where a public service or public use is involved there can be lodged nowhere powers of unjust and unreasonable discrimination."

"The respondents further contend that the Commission is without jurisdiction; that the matter in controversy is within the sole jurisdiction of the Interstate Commerce Commission under Acts of Congress."

"The telegraph is an instrument of commerce and as such for some purposes, comes within the Interstate

Commerce clause and Postal Clause of the Federal Constitution; and the provisions of Section 3 of the Acts of Congress to regulate Interstate Commerce were, by amendment of June 18, 1910, extended to 'telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory or district of the United States to any state, territory or district in the United States or to any foreign country.' And this amendment also provides that its provisions shall not apply, 'to the transmission of messages by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country or from or to any state or territory, as aforesaid.'"

"It seems clear that this amendment was intended to apply to the telephone and telegraph companies in their business of serving the general public as common carriers of messages. There is involved in this case, as we view it, no question concerning the duty to the public of a telegraph company in its ordinary telegraph business of carrying or transmitting messages to the public for hire. The business of the respondents which we are dealing with is as we have before noted, a public business of very different character. There are no messages, in the ordinary sense of the word ( the sense in which we conceive it to be used in the amendment referred to above), sent from anywhere. The respondents purchase in New York City a certain commodity or property, to wit, quotations of the New York Stock Exchange. They are under no obligation to the Exchange to send this property or commodity anywhere. In order to resell or to retail it in Boston the respondents have it conveyed or shipped to Boston by the only means by which it can effectively be conveyed, over fast wire telegraph lines, — in case of the Gold and Stock Telegraph Company over the wires of the Western Union Telegraph; and in the case of the United Telegraph Company over the wires of the Postal Telegraph Cable Company. It is delivered in Morse Code at the main offices of the respondents, in Boston and at these offices is translated into words and numerals in the ordinary alphabet and sent out over their respective 'Stock telegraph systems' to their various patrons."

"There is no doubt, of course, that while it is being conveyed over the wires from New York to the main offices of the respondents in Boston (in the Morse Code) it is a commodity or property moving in Interstate Commerce over which Congress has jurisdiction. But in our opinion the jurisdiction of Congress ceases when the property is delivered at the main office in Boston. After it is delivered there the respondents are under no duty or obligation to the Exchange to resell or distribute it. There must be some time when the commodity or property in question in this case becomes subject to the laws of Massachusetts. In our view it is when the quotations are delivered at the respective main offices of the respondents in Boston. If, however, we are in error in this view as there has been no specific action by the Interstate Commerce Commission dealing with the subject matter in controversy in this case, and as it is not clear that this matter is within the above mentioned amendments of June 18, 1910, we hold that until Congress or the Interstate Commerce Commission takes some specific action, this commission has jurisdiction. Indeed the duties of the companies to give service with substantial impartiality and without invidious discrimination is a common law duty not dependent upon legislative enactment or administrating order. It would seem beyond question that in the absence of any specific action by Congress or the Interstate Commerce Commission there resides in the State Courts and Commission at least concurrent power of remedial action."

"The order for the removal of the discrimination complained of in this case is an enforcement of the common law duty of the companies and cannot be said to impose any tax or burden upon the Interstate transmission of the quotations nor to embarrass, obstruct or impede the full and fair performance of service to any persons or corporations not within the jurisdiction of this commission. The respondents, if they furnish or supply to any customer in Boston the quotations of the New York Stock Exchange by means of the ticker or stock telegraph systems, must furnish or supply them without unjust and unreasonable discrimination to all customers

within the district or districts supplied by their respective service who will comply with all lawful regulations connected with the service, and who desire said quotations for lawful and proper use."

"ORDER"

"It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegraph Company, have without just cause denied and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination; and it is

ORDERED, That the Gold and Stock Telegraph Company by the Western Union Telegraph Company, lessee, and the United Telegram Company shall forthwith remove said discrimination."

The Telegraph Companies refused to obey the Order of the Commission and took an appeal as provided by Chapter 784 of the Acts of 1913 to the Supreme Court of the County of Suffolk, by filing a petition seeking to annul the said order and thereafter Foster and the members of the Commission filed their answers to said petition.

The Commission through the Attorney General's Department then filed a Bill of Equity against the Telegraph Companies to compel their obedience to the order of the Commission. After the pleadings had been completed both cases were reserved for a decision by the Supreme Judicial Court for the Commonwealth, and thereafter the cases were argued as reserved; the New York Stock Exchange through counsel having appeared and filed a brief in support of the contentions raised by the Telegraph Companies; thereafter the Supreme Judicial Court for the Commonwealth filed a rescript dismissing the petition of the Telegraph Companies, and ordering a decree to be entered in the suit of the

Commission commanding the Telegraph Companies to comply with the Order of the Commission.

Final decrees having been entered in accordance with the rescript of the Supreme Judicial Court for the Commonwealth the Telegraph Companies then sued out a writ of error in each case; the specific errors set forth in the assignment while four in number are reduceable in substance to two —

> FIRST: — That the plaintiffs in error would be required in order to comply with the Order of the Public Service Commission of Massachusetts to appropriate the property of the New York Stock Exchange for the benefit of Foster, the defendant in error, and thereby destroy valuable contracts of the plaintiffs in error with said Exchange contrary to the provisions of the Federal Constitution in that the plaintiffs in error would thereby be deprived of their property without due process of law; and that the Supreme Judicial Court in holding and deciding to the contrary was in error.
>
> SECOND: — That the Public Service Commission of Massachusetts had no jurisdiction over the subject matter of Foster's Complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission and that the Supreme Judicial Court was in error in holding and deciding to the contrary.

Both of these claims will be now discussed in the order in which they are stated:—

## POINT ONE

## DUE PROCESS OF LAW ISSUE

### IN CONSTRUING THE CONTRACT DATED JULY 1, 1914, BETWEEN THE TELEGRAPH COMPANY AND THE STOCK EXCHANGE, THE SUPREME JUDICIAL COURT OF

MASSACHUSETTS INTERPRETED IT AS TRANSFERRING A PROPERTY RIGHT IN THE QUOTATIONS TO THE TELEGRAPH COMPANY; THAT IN PURCHASING THE SAID PROPERTY RIGHT AND THEREAFTER FURNISHING THE QUOTATIONS TO STOCK BROKERS AND OTHERS, THAT THE STATUS OF THE TELEGRAPH COMPANY WAS NOT THAT OF A COMMON CARRIER OF MESSAGES: THAT THE RELATION AND STATUS BETWEEN THE STOCK EXCHANGE AND TELEGRAPH COMPANY UNDER THE CONTRACT WAS THAT OF VENDOR AND VENDEE OF A COMMODITY, TO WIT:— COMMERCIAL NEWS — AND THAT THE RELATION AND STATUS EXISTING BETWEEN THE TELEGRAPH COMPANY AND THE SUBSCRIBER RECEIVING THE SAID QUOTATIONS WAS ALSO THAT OF VENDOR AND VENDEE. THIS INTERPRETATION WAS CORRECT; BUT ASSUMING SUCH INTERPRETATION TO BE ERRONEOUS, SUCH ERROR DID NOT DEPRIVE THE PLAINTIFFS IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION.

## ARGUMENT

The Telegraph Company's refusal to furnish Foster with the continuous quotations of the Stock Exchange is

based on the contract of July 1, 1914. On pages 23 and 24 of the record (case No. 274) the following allegations are found:

> "That the respondent, the Western Union Telegraph Company by reason of the fact that it has not such control of said quotations as to enable it to transmit the same to complainant without the approval of the said Exchange and in obedience to the dictates of good faith in performing the obligations of said contract and for no other reason whatsoever, determined not to continue said ticker service to complainant herein."

The Telegraph Company contends that in construing this contract the Court is bound to construe it in accordance with the intentions of the contracting parties, to wit, the Stock Exchange and the Telegraph Company: that as they both agree that the property right in the quotation still remains in the Stock Exchange, and that in the furnishing of such quotations that the Telegraph Company is acting as a common carrier of messages sent by the Stock Exchange, that the Courts can not in such case interpret the contract in direct opposition to what the parties to it agree shall be its meaning and effect.

The answer to this claim is that the contract between the Stock Exchange and the Telegraph Company is neither ambiguous nor uncertain in its provisions with reference to the property right of the Telegraph Company in the quotations; that the interpretation placed on the contract by the Stock Exchange and the Telegraph Company is illogical and contrary to all principles of interpretation and repugnant to the express language of that clause in the contract which was intended by both parties to define and explain the right of the Telegraph Company over the quotations.

There is no question that when a contract is ambiguous or uncertain in its provision that in arriving at the true meaning thereof that the Court will be governed by the intention of the parties; but that rule does not apply in the interpretation of contracts in which there

is no ambiguity nor uncertainty whatever, and cannot possibly apply to alter the plain and unambiguous language and terms of a contract.

The particular provisions of the contract of July 1, 1914, dealing with the control by the Telegraph Company over the quotations are as follows, to wit:—

> *Article* 1. By the terms of this article the Exchange agrees at its own expense to collect, furnish and transmit reports of transactions upon the Exchange to the Telegraph Company.
>
> *Article* 8. The consideration paid by the Telegraph Company to the Exchange for the services performed by it in transmitting and furnishing the reports of transaction upon the Exchange is fixed at the price of $50,000 per annum.
>
> *Article* 4. By this article it is provided that the Telegraph Company may sell the quotations to any person whether a member of the Exchange or not anywhere in the United States or Canada outside the portion of the Borough of Manhattan lying south of Chamber Street; then follows the provision that the Telegraph Company shall not after November 1, 1914, furnish quotations to any subscriber unless such subscriber shall have signed in duplicate an application therefor addressed to the Telegraph Company and the subscriber shall have been approved by the Exchange.
>
> *Article* 11. By this article it is provided as follows:
>
> "It is understood and agreed that as to the right of the Exchange hereinbefore specified to disapprove applications for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations."

It is apparent from the foregoing provisions that the contract constituted a sale of a property right in the quotations by the Stock Exchange to the Telegraph

Company, and that throughout its entire provisions there is nothing inconsistent with such construction. The arbitrary right of the Exchange under Article 4 — to disapprove applicants for the quotations and to thus arbitrarily limit the sale of them by the Telegraph Company is absolutely and expressly controlled by the provisions of the eleventh article which by clear and unambiguous language specifically provides that the right of the Exchange under the fourth article to disapprove applications was intended only to prevent the unlawful or improper use of the quotations.

The provisions of the eleventh article were clearly inserted for the protection of the Telegraph Company and its customers, and was intended, and is stated in the contract as intended to limit the right of the Stock Exchange to disapprove applicants to cases where it was proposed to use the quotations, or they were being used for unlawful or improper purposes. When such a situation does not exist the Stock Exchange has no right under the contract to refuse its approval of any application, and the Telegraph Company in turn cannot base its refusal to furnish such service by reason of the contract with the Stock Exchange as it now seeks to do in the case at bar. The Telegraph Company cannot waive the provision of the eleventh article; a Telegraph Company engaged in the business of transmitting intelligence being a public service corporation cannot shield itself from the performance of duties imposed upon it by law (to furnish equal service and facilities to all persons) by the waiver of the above provisions of its contract with the Stock Exchange any more than it could by self-imposed restrictions contained in any contract it might enter into, thereby avoid the duties imposed upon it by law. The Telegraph Company is bound to acquire such rights in the quotations of the Stock Exchange as are necessary to discharge its duty to the public as prescribed by the statute, otherwise it has no right to engage in the business of selling quotations at all.

The theory that the contract constitutes a sale of information by the Exchange to the Telegraph Com-

pany is further supported and confirmed by its other provisions. On Page 41 of the record Exhibit "C" the following provision of the contract will be found, to wit,—

> "The Exchange does not guarantee the accuracy or completeness of said quotations, but undertakes to use reasonable diligence to make the same as accurate and complete as may be practicable; it being distinctly understood and agreed, however, that the Exchange shall not be liable to the Telegraph Company or to any of the persons to whom it may furnish the same or to any persons whatsoever for any inaccuracies, errors or omissions in said quotations or for any damages arising therefrom or occasioned thereby."

The above provision was inserted to protect the Exchange against any implied warranty in favor of the Telegraph Company or to the patrons of the Telegraph Company arising from the sale of the quotations by the Exchange to the Telegraph Company. Such a clause would not have been necessary in a contract for Telegraph service. It is only consistent with the interpretation of the contract as a sale by the Exchange of the quotations to the Telegraph Company.

Another provision in the contract is of the same character. The application blank contained in the contract (see page 45 of the record Exhibit "C") provides as follows:—

> "The Telegraph Company shall not be pecuniarily liable for the accuracy of the quotations, nor for any delays, inaccuracies, errors or omissions in said quotations or for any damages arising therefrom or occasioned thereby."

If the contract between the Telegraph Company and the Exchange was a contract for mere carriage by the Telegraph Company of messages sent by the Stock Exchange, this provision in the application would have been so drawn as to protect the Stock Exchange and not the Telegraph Company from the results of

inaccuracy in quotations. The property right under the contract being in the Telegraph Company, however, it became necessary to insert a clause in the application to bind the subscriber and to protect the Telegraph Company against any action by a subscriber arising from the cause set forth.

The subscribers for quotation service do not pay the Stock Exchange for the information; the subscribers pay the Telegraph Company and the Stock Exchange has no interest of any nature or description in the amount received from such subscriber by the Telegraph Company. The Telegraph Company is under no obligation to the Exchange whatever to deliver or furnish quotations to anyone.

The identical contract which was before the Massachusetts Supreme Judicial Court was also before the New York Courts for construction. It was then decided that the only right which the Stock Exchange retained in the quotations after delivery to the Telegraph Company was the right to prevent the delivery of the quotations to persons intending to use the quotations for illegal and unlawful purpose; that in furnishing and delivering the quotations to its subscribers that the Telegraph Company was not acting in its capacity as a common carrier of messages sent by the Stock Exchange; that the Telegraph Company was under no obligation to the Exchange to furnish or distribute the quotations after it had been delivered to the Telegraph Company by the Exchange, and that the furnishing and delivering of the quotations by the Telegraph Company to subscribers was a collateral undertaking apart from its ordinary and usual occupation, as a common carrier of messages for hire.

*Tucker vs. W. U. Tel. Co. Erie Co. Supreme Court, N. Y., June* 1915

*Affirmed unanimously by the Appellate Div. Dec.,* 1915, 155 *N. Y. Sup.* 1148. (*Copy of the Opinion is annexed to Brief on Motion to Dismiss filed Jan.* 1917.)

The construction placed on the contract by the New York Courts and by the Massachusetts Supreme Judicial Court was also adopted by the District Court of the United States for Massachusetts.

*New York Stock Exchange vs. Calvin H. Foster, et al.* (*See record in case No.* 419 *Oct. term* 1917 *page* 55. *Opinion by Mr. Justice Dodge.*)

The interpretation and validity of a contract is determined by the law of the place where the contract is made; the contract between the Exchange and the Telegraph Company was executed, delivered and made in the State of New York between citizens of New York; apart from the force of its own reasoning and logic, the Supreme Judicial Court of Massachusetts was justified under the full faith and credit clause of the Federal Constitution in adopting the construction which the Courts of New York placed on the contract.

*Sim vs. Edenborn* 242 *U. S.* 131 (61:199)

It is fundamental that where the parties have been fully heard in the regular course of Judicial Procedure that an alleged erroneous decision of a State Court construing a contract does not raise a Federal question; Courts of the United States have no jurisdiction to correct such an alleged error.

*Knox vs. Exchange Bank,* 12 *Wall* 379 — (20:414)

*Morley vs. Lake Shore R. R.* 146 *U. S.* 162 — (36:925)

*Central Land Co. vs. Laidley* 159 *U. S.* 103 — (40:91)

*Cross Lake F. & S. Club vs. Louisiana* 224 *U. S.* 632 — (56:924)

Even where the Federal Question upon which the jurisdiction of the Courts of the United States is based grows out of an alleged impairment of the obligation of a contract it is now definitely settled that a contract

can only be impaired within the meaning of this clause of the Constitution so as to give the Federal Courts jurisdiction where the State Statute has been passed subsequent to the making of the contract which is alleged to have been impaired. Chapter 784 of the Act of 1913 of the Commonwealth of Massachusetts under which these cases arose was in existence before the contract between the Stock Exchange and the plaintiff in error was made, the latter having been executed and delivered July 1, 1914. There is no ground upon which to base the claim that the plaintiffs in error were deprived of their property without due process of law.

*Central Land Co. vs. Laidley* 159 *U. S.* 103 — (40:91)

*St. Paul R. R. Co. vs. Todd,* 142 *U. S.* 282 — (35:1014)

*Turner vs. The Wilkes Co.,* 173 *U. S.* 461 — (43:768)

*Cross Lake F. & S. Club vs. Louisiana* 224 *U. S.* 632 —(56:924)

## POINT TWO
## INTERSTATE COMMERCE ISSUE

THE TELEGRAPH COMPANY HAVING SET UP THE CLAIM THAT IN FURNISHING THE QUOTATIONS IN BOSTON THAT THE TELEGRAPH COMPANY WAS ACTING IN THE CAPACITY OF A COMMON CARRIER OF MESSAGES AND THAT TO ORDER OR COMPEL THE TELEGRAPH COMPANY TO FURNISH THE QUOTATIONS TO FOSTER WITHOUT THE APPROVAL OF THE STOCK EXCHANGE WOULD BE A VIOLATION OF ITS CONTRACT WITH THE EXCHANGE, AND THUS RESULT IN TAKING OF PROPERTY, CONTRARY TO DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION,— AND IT HAVING PLEADED AND RELIED UPON ITS CONTRACT WITH THE EXCHANGE TO PROVE SUCH CLAIM,— AND THE STATE COURT HAVING DECIDED THAT THE TELEGRAPH COMPANY WAS NOT ACTING UNDER THE CONTRACT AS A COMMON CARRIER OF MESSAGES, BUT AS THE VENDOR OF A VALUABLE COMMODITY, TO WIT,— COMMERCIAL NEWS AND INFORMATION PURCHASED BY AND DELIVERED TO THE TELEGRAPH COM-

PANY IN NEW YORK AND THEREAFTER SENT FROM NEW YORK TO BOSTON, FOR THE PURPOSE OF BEING DISTRIBUTED TO ITS PATRONS,—THAT SUCH BEING THE CASE, THE ABOVE CONSTRUCTION BY THE STATE COURT BECOMES THE SETTLED LAW OF THE CASE NOT ONLY FOR THE PURPOSE OF DETERMINING WHETHER THERE WAS A TAKING OF SUCH PROPERTY WITHOUT DUE PROCESS OF LAW BUT ALSO (SO FAR AS SUCH CONSTRUCTION IS RELEVANT) FOR DETERMINING THE REMAINING CONTENTION OF THE TELEGRAPH COMPANY, TO WIT,—THAT IN FURNISHING THE QUOTATIONS TO SUBSCRIBERS IN BOSTON THAT THE TELEGRAPH COMPANY WAS ACTING AS A COMMON CARRIER OF INTERSTATE MESSAGES.

## ARGUMENT

The following language is taken from the opinion by Chief Justice White in *Baccus vs. Louisiana* 232 *U. S.* 233 — (58:627):

> "We accept the construction affixed by the Court below to the statute and upon which alone it could in reason have held that the acts charged were embraced by its provisions. We hence disregard the intimation made in the argument of the defendant in error that the statute is susceptible of a

different interpretation, and therefore that the claim of Federal right which was made below, and which was passed upon need not be here considered; it is inconceivable that the statute should mean one thing for the purpose of determining whether the acts charged were within its terms, and should then be held to mean another, for the purpose of escaping the Federal Question."

In the Tucker case above cited, one of the chief issues was whether the Telegraph Company was acting as a common carrier of messages in furnishing the quotations to subscribers in New York, and therefore subject to the provisions of Section 552 of the Penal Code regulating the sending of messages by Telegraph Companies. In the opinion of Mr. Justice Pooley (which was unanimously affirmed by the Appellate division) the Court held that the Telegraph Company was not acting as a common carrier of messages and that the provisions of the Penal Code had no application to the Telegraph Company in its business of distributing quotations. The Court not only interpreted the identical contract which was in issue in the case at bar, but also interpreted the statute of New York regulating the sending of messages by Telegraph Companies, and unequivocally rejected the claim that the Telegraph Company was acting as a common carrier of messages; The United States Supreme Court will therefore accept as the settled law of the case the conclusions reached by the New York and Massachusetts Courts, to wit,— that in furnishing and distributing the quotations of the Stock Exchange that the Telegraph Company was engaged in the business of selling commercial news and information to its subscribers in New York and Boston.

*Baccus vs. Louisiana* 232 *U. S.* 233 — (58:627)

*Northern Pacific R. R. Co. vs. Meese* 239 *U. S.* 613 — (60:467)

## POINT THREE

## ON THE FACTS IN THE CASE AT BAR NO QUESTION OF INTERSTATE COMMERCE IS INVOLVED AS THE FURNISHING OF QUOTATIONS BY THE TICKER SERVICE TO SUBSCRIBERS IN BOSTON IS PURELY INTRA-STATE BUSINESS AND SUBJECT TO STATE REGULATION.

### ARGUMENT

The manner and method of distributing the quotation in Boston appears by the report of the Commission to be as follows:—

> "The Telegraph Companies purchase the quotations in New York from the New York Stock Exchange; the quotations are delivered by the Stock Exchange to the Telegraph Companies in New York; thereafter the Telegraph Companies send the quotations from their office in New York to their own Boston office; the said quotations being sent from New York to Boston in Morse Code Telegraph Dispatch Form over their own wires. After the Telegraph Companies receive the quotations in Boston they are translated from the Morse Code into words and numerals in English and sent out over the ticker system to the various Boston subscribers. Each Telegraph Company has a main office in Boston where there are certain electrical appliances with a keyboard attachment. These appliances are connected by a system of wires running under and across the Public ways of the City of Boston, with the stock ticker instruments in the offices of the patrons; after the Morse Code message which is sent from New York arrives in Boston, it is translated and an employee of the

Telegraph Company operating the keyboard above referred to causes the quotations to be written simultaneously by means of these ticker instruments upon a tape in the office of each patron so that they can be easily read."

From the above facts as established at the hearing before the Commission it conclusively appears that the sending of the quotations in the Morse Code Telegraph Dispatch Form from the New York Office of the Telegraph Company is an entirely separate, distinct and independent transaction from the sending of the quotations to a subscriber after they have arrived in Boston. The quotations as sent from New York to Boston are not sent to, addressed to, or intended to be delivered to a subscriber; the quotations when delivered to a subscriber in Boston are delivered in the English Alphabet and numerals only and this is accomplished solely by means of the ticker service which is entirely distinct from the Interstate Message Service being operated and conducted by means of appliances and instrumentalities wholly devoted to this particular local business and having no physical attachment or connection with the instrumentalities and appliances by means of which the Telegraph Company as a common carrier transmits messages between New York and Boston.

In other words, there are no messages at all sent by the ticker service from New York.

The facts established by the Public Service Commission will be accepted as final and conclusive on writ of error to this Honorable Court.

*Egan vs. Hart*, 165 *U. S.* 188 — (41:680)

*Chrisman vs. Miller*, 197 *U. S.* 313 — (49:770)

*Waters-Pierce Co. vs. Texas* 212 *U. S.* 86— (53:417)

*King vs. W. Va.* 216 *U. S.* 92 — (54:396)

*Rankin vs. Emigh*, 218 *U. S.* 27— (54:915)

The circumstances under which the Telegraph Company procure the quotations in New York and thereafter furnish them to their Boston subscribers is exactly similar and analogous in all its detail to the case of a merchant having an established business for the sale of goods at retail in Boston, buying goods in bulk or in gross in New York and thereafter shipping the goods to Boston in bulk or in gross consigned to his own order for the purpose of sale at retail to his various patrons in Boston.

It is fundamental that if a shipment of goods, wares, merchandise, or other commodity is made from one state to another addressed or consigned to the shipper's own agent or order, and that after arrival in the latter state of such goods, wares, merchandise, or other commodity it appears that the original package is broken, its form or condition changed, or if it appears that after arrival the contents of the original package is sold and disposed of to many different persons, that such a transaction does not constitute Interstate Commerce; it is only the original package in the identical form and condition which it was in at the time it started on its interstate journey that is not subject to State Laws.

*Mutual Film Co., vs. Industrial Com.* 236, *U. S.* 230—(58:~~558~~) 552

*May vs. New Orleans*, 178 *U. S.* 496— (44:1165)

*Austin vs. Tennessee*, 179 *U. S.* 343— (45:224)

Goods, wares, merchandise, or other commodities cease to constitute a part of Interstate Commerce and become part of the general property in the State and amenable to its laws, upon arrival, if they are sent into the State either for the purpose of sale or in consequence of a sale, provided the state laws do not discriminate against them as property coming from another state.

*Brown & Houston*, 114 *U. S.* 622— (29:257)

*Pittsburgh & S. Coal Co. vs. Bates* 156 *U. S.* 577— (39:538)

*Austin vs. Tennessee*, 179 *U. S.* 343—(45:224)

*Diamond Match Co. vs. Ontonagon*, 188 U. S. (48:538) 47, 394

*Am. Steel & Wire Co. vs. Speed*, 192 U. S. 520 — (48:538)

*Kehrer vs. Stewart*, 197 U. S. 60— (49:663)

*General Oil Co. vs. Crain*, 209 U. S. 211 — (52:755)

*Mutual Film Co., vs. Industrial Com.* 236 U. S. 230 — (58:558)

It is only direct interference with the freedom of Interstate Commerce which brings a case within the exclusive domain of Federal Legislation,

*Western Union Telegraph Co. vs. James*, 162 U. S. 650 — (40:1105)

*Hopkins vs. U. S.* 171 U. S. 578 — (43:290)

*No. Pacific R. R. Co. vs. Larrabee Flour Mills*, 211 U. S. 612 — (53:352)

*Atlantic Coast Line R. R. Co. vs. Glenn*, 239 U. S. 388 — (60:344)

*Ill. Cent. R. R. Co. vs. Mulberry Hill Coal Co.*, 238 U. S. 275 — (59:1306)

*Pa. R. R. Co. vs. Puritan Coal Min. Co.*, 237 U. S. 121 — (59:867)

*M. K. & T. Railway Co. vs. Harris*, 234 U. S. 412 — (58:1377)

*St. Louis I. M. & S. Railway vs. Arkansas*, 240 U. S. 518 — (60:776)

The ticker service is wholly within the state and is presumably subject to State Laws, unless it is clearly established that the ticker service is Interstate in character; the locality of the service will determine the question of jurisdiction.

*Pennsylvania R. R. Co. vs. Knight*, 192 U. S. 21 — (48:325)

*Hall vs. Geiger Jones Co.* 242 U. S. 541—(61:481)

State regulation of Telegraph Companies conflicts with Federal Jurisdiction only when the regulation applies to an act performed or omitted and not performed outside the state.

*Western Union Telegraph Co. vs. Brown*, 234 *U. S.* 542 — (58:1452) 1457

*Western Union Telegraph Co., vs. James*, 162 *U. S.* 650 — (40:1105)

The provision of the contract which prevents the Telegraph Company from selling the quotations to persons intending them for illegal use ("bucket shop") seems to have removed all possibility that the quotations should ever become the subject of any controversy between a Telegraph Company and a subscriber for ticker service, other than such as must necessarily be determined in accordance with State Laws and not in accordance with existing Federal Legislation. Contracts and agreements for the purchase and sale of stocks and bonds and the business of Stock Exchanges and stock brokers are not regulated by the laws of Congress but under the Police Power of the several states:—

*Hopkins vs. U. S.*, 171 *U. S.* 578 — (43:290)

*Hall vs. Geiger Jones Co.*, 242 *U. S.* 541 — (61:481)

If the Telegraph Company refused to furnish its ticker service to a broker in Chicago upon the ground that he was conducting an illegal stock brokerage business and the broker should file a complaint against the Telegraph Company for such refusal, it is self evident that the only issue in the case would be whether the business as conducted by the broker in Chicago violated the Statutes of Illinois relating to stock brokers and their business; and if the Court should find that the business was conducted in accordance with the laws of Illinois then it would necessarily so rule and an order would issue to the Telegraph Company to remove the discrimination. It is also self evident that the laws of the several states, regulating contracts for the purchase

and sale of securities and the methods of brokers dealing in such securities may differ and do differ widely, so that what may be legal and valid in one state might be illegal and even criminal in another; from the foregoing considerations it is manifest that if any Federal Tribunal should assume jurisdiction over complaints against a Telegraph Company for its refusal to furnish its ticker service to a broker denied such service upon the ground of illegal intent in the use thereof, that in such case such Tribunal would be compelled in each case to adopt the construction which the State Court adopted in construing the State Statute governing the business of brokers, in order for such tribunal to apply the law to the facts:—

*Northern Pacific R. R. Co. vs. Meese*, 239 *U. S.* 613—(60:467)

In other words in acquiring or assuming jurisdiction and control over complaints against a Telegraph Company for refusing to furnish its ticker service to a broker requiring the same under its existing contract with the Exchange, Federal Tribunals would not be enforcing the provisions of one uniform system of Federal Law regulating the right of a subscriber to have such service but would be enforcing different systems of State Law as numerous as the States themselves, and as diverse in character as the citizens that compose them.

No logical reason can be shown why the regulation of such business when conducted in Massachusetts by a Telegraph Company now is or should be held to be within the spirit of the Interstate Commerce Act. The business as conducted is one which does not admit of uniformity of regulation which is the supreme test of Federal Power and Control.

*Cooley vs. Board of Wardens*, 12, *How* 299—(13:996)

*Minnesota Rate Cases*, 230 *U. S.* 1400—(57:1541)

## POINT FOUR

## THERE IS NO FEDERAL QUESTION PRESENTED BY THE RECORD WITH REFERENCE TO THE CLAIM THAT THE SUBJECT MATTER OF FOSTER'S COMPLAINT WAS WITHIN THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

### ARGUMENT

The jurisdiction of the Interstate Commerce Commission over Telegraph Companies was conferred under the Act of June 18, 1910, Chapter 309, Section 7, amending Section 1 of the Interstate Commerce Act; said Section 1 as so amended reading so far as Telegraph Companies are concerned as follows, to wit,—

> "Section 1:—That the provision of this Act shall apply to telegraph, telephone and cable companies engaged in sending messages from one state, territory or district of the United States to any other state, territory or district of the United States, or to any foreign country and who shall be considered and held to be common carriers within the meaning and purpose of this Act; provided, however, that the provision of this Act shall not apply to the transmission of messages by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country or from or to any state or territory as aforesaid."

---

### CONTENTION OF THE PLAINTIFFS IN ERROR

The plaintiffs in error contend that in furnishing and distributing the quotations made on the New York

Stock Exchange to subscribers in Boston that they are acting as common carriers of messages sent to such subscribers from New York; that consequently the sending of such quotations as messages from New York to Boston constitutes the sending of Interstate Messages over which the Interstate Commerce Commission has sole jurisdiction in accordance with the provisions of the Acts of Congress June 18, 1910, Chapter 309.

---

## CONTENTION OF CALVIN H. FOSTER, DEFENDANT IN ERROR

The Defendant in Error, Foster, contends that as it appears that the Supreme Judicial Court of Massachusetts held that the provisions of Chapter 784 of the Acts of 1913 (under which the litigation was instituted before the Public Service Commission) applied solely to the local business of the Telegraph Company as a distributor of the quotations after their arrival in Boston solely by means of the ticker service;— and as it appears that the Court also held that the transmission of the quotations from New York to Boston in the Morse Code Form was an Interstate Transaction over which the state had no control,— that the application of the State Statute having been thus limited and confined to the local and domestic distribution of the quotations by the ticker service after the Interstate transmission in Morse Code had been completed thereby under the decisions of the Supreme Court of the United States disposes of and forecloses the claim of jurisdiction in the Interstate Commerce Commission,

*Stone vs. The Farmer's Loan & Trust Co.*, 116 *U. S.* 307 — (29:636)

*Louisville M. O. & T. R. vs. Miss.* 133 *U. S.* 587 — (33:784)

*W. U. Tel. Co. vs. James* 162 *U. S.* 650 — (40:1105)

*Hennington vs. Ga.* 163 *U. S.* ~~229~~ 299 — (41:166)

*Osborne vs. Fla.* 164 *U. S.* 650 — (41:586)

*Lake Shore & M. S. R. Co. vs. Ohio,* 173 *U. S.* 285— (43:702)

*Mo. R. & T. Co. vs. McCann,* 174 *U. S.* 580— (43:1093)

*Ches. & Ohio R. R. Co. vs. Ky.* 179 *U. S.* 388— (45:244)

*Erie R. R. Co. vs. Purdy,* 185 *U. S.* 148 — (46:847)

*Overton vs. Oklahoma,* 235 *U. S.* 31 — (59:~~121~~) 112

## POINT FIVE

### ASSUMING FOR THE PURPOSE OF ARGUMENT THAT THE DISTRIBUTION OF THE QUOTATIONS BY THE TELEGRAPH COMPANY IN BOSTON BE TREATED AS AN INTERSTATE TRANSACTION — EVEN IN SUCH CASE, THE INTERSTATE COMMERCE COMMISSION HAD NO JURISDICTION OVER FOSTER NOR OVER THE TELEGRAPH COMPANY IN THE CHARACTER THEY EACH PRESENTED THEMSELVES BEFORE THE COURT: NOR HAD THE INTERSTATE COMMISSION JURISDICTION OVER THE SUBJECT MATTER OF THEIR DISPUTE.

### ARGUMENT

In the Foster complaint filed with the Public Service Commission there is no charge that there was any violation or evasion of the Interstate Commerce Act or its amendments involved in the refusal of the Telegraph Company to supply him with the ticker service; the complaint charged that the Telegraph Company was engaged in the business of selling market news and information (the quotations of the New York Stock Exchange) and that the refusal to sell to him was an unjust discrimination; The Courts of New York and Massachusetts interpreting the contract between the Stock Exchange and the Telegraph Company both held that there were no messages sent by the Stock Exchange to anyone; and the Supreme Judicial Court of Massachusetts held that after the quotations were delivered to the Telegraph Company in New York that it was under

no obligation or duty to the Exchange to send the quotations anywhere; that for the purpose of selling the quotations in Boston the Telegraph Company sends the quotations to its main office in Boston where they are translated and distributed by the ticker service.

It is clear that the character in which Foster presented himself to the Court was not that of a shipper or consignee of a commodity nor that of the addressor or addressee of a message having a grievance relating to an unjust or unreasonable rate or charge or any complaint connected with the transportation or transmission of a commodity or message. The purpose of the Interstate Commerce Act is to facilitate commerce by the adoption of regulations to make charges for *transportation* just and reasonable and to forbid undue and unreasonable preferences, as to such rate or charge:

> *Texas & P. R. R. Co. vs. Interstate Commerce Commission*, 162 *U. S.* 197 — (40:940)
>
> *N. Y., N. H. & H. R. R. vs. Interstate Commerce Commission*, 200 *U. S.* 361 — (50:515)

The Foster suit was directed against a Telegraph Company occupying a Dual Position to wit:— That of a Public Carrier of Interstate Messages, and that of a private shipper and owner of market news and information; and the unjust discrimination charged and proved arose from the refusal of the Telegraph Company while acting solely in the character of a private shipper and owner of market news and information.

The Interstate Commerce Act as amended in 1906 by the Hepburn Act (generally known as the Commodity Clause) does not prevent a Telegraph Company from using its Interstate Facilities for the purpose of selling as owner or agent market news and information: nor does the Act prohibit such Telegraph Companies from transmitting market news as such private shipper and owner from one state to another for the purpose of sale. The Hepburn Act applies solely to railroad companies and was intended to divorce such companies from occupying the inconsistent position of being a private

shipper and owner of commodities transported by them as a common carrier for hire.

*U. S. vs. Del. & Hud. R. R. Co.* 213 *U. S.* 366 — (53:836)

*U. S. vs. Del. & Hud. R. R. Co.* 238 *U. S.* 516 — (59:1438)

The Act of June 18, 1910, which for the first time brought Telegraph Companies within the provision of the Interstate Commerce Act makes no attempt to prevent Telegraph Companies subject to the Act from engaging in the business of selling market news and information nor does it prohibit such companies from using their interstate facilities in the prosecution of such business. It follows that in the conduct of such private business a Telegraph Company stands exactly in the same situation today as a railroad Company stood before the Hepburn Act was passed and that "subject to the two leading prohibitions that its charges shall not be unjust or unreasonable and that it shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves a Telegraph Company now as it formerly left Railroad Companies free from interference or control by the Interstate Commerce Commission."

*Interstate Com. Com. vs. Chicago, G. W. R. Co.*, 209 *U. S.* 108 — (52:705)

It being apparent that the Interstate Commerce Act makes no attempt to prohibit nor prevent a Telegraph Company from occupying the Dual Position of public carrier of messages and private shipper of market news, and it being clear that the Interstate Commerce Act has no greater scope against a Telegraph Company now than it formerly had against railroad company prior to 1906 when the Hepburn Act was passed —it then follows as a necessary conclusion that in order to bring the affairs and matters arising out of the business of selling market

news by a Telegraph Company within the jurisdiction of the Interstate Commerce Commission because of some act or omission of the Telegraph Company in its character as a private shipper and owner of market news, that such act or omission must be charged and proved to operate as an unjust or unreasonable rate or discrimination as to a rate or charge by a common carrier or that such act or omission operates to nullify some specific provision of the act to regulate commerce.

*N. Y., N. H. & H. R. R. Co. vs. Interstate Com. Com.*, 200 *U. S.* 361 — (50:515)

As the Foster complaint did not involve any charge of an unjust or unreasonable rate or unjust discrimination as to a rate or that the purpose of the act was nullified or evaded by the refusal to furnish the quotations to Foster, such refusal did not constitute an unjust practice or discrimination within the provisions of Sec. 15 of the Interstate Commerce Act as amended in 1910; the matters over which the Interstate Commerce Commission is given exclusive primary jurisdiction to hear and determine by Sec. 15 are (1) rates and charges claimed to be unjust or unreasonable; (2) regulations and practices of carriers affecting rates claimed to be unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of the Act and are limited to general rates, practices or regulations applicable to all shippers alike and which the Commission in the exercise of its administrative powers may correct by a general order.

*Langdon vs. Penn. R. R. Co.*, 194—Fed. 486
*U. S. vs. Penn. R. R. Co.*, 242 *U. S.* 208 — (61:251)

Foster had no reason to invoke the jurisdiction of the Interstate Commerce Commission; what relief could it give him? There was no question about a tariff — there was no claim of unjust discrimination or of an unjust practice with reference to transportation or charges. The refusal which constituted the unjust discrimination was justified and defended solely upon the

interpretation placed on a contract which the Telegraph Company claimed to be legal and relied upon as an absolute defense to the furnishing of the service demanded. The complainant Foster admitted the contract to be legal as drawn but claimed that the interpretation by the Telegraph Company was erroneous. There was no necessity to resort to any interpretation or application of the Interstate Commerce Act or its amendments to determine which interpretation of the contract was correct; no one claimed that the contract was invalid as drawn; and if the contract was valid and its terms justified the refusal there could be no unjust discrimination. The decision of the question had to turn not upon any administrative question or question of fact within the scope of the power of the Interstate Commerce Commission but upon the interpretation of a contract which controlled the action of the carrier. That was a question of general law for a Judicial Tribunal and such a question the Commission as a purely administrative body, is not competent to determine.

*Louisville & N. R. Co., vs. F. W. Cook Brew. Co.*, 223 *U. S.* 70 — (56:355)

The duty of a common carrier to furnish special services or facilities not required by some specific provision of the Interstate Commerce Act as amended is a duty which cannot be specifically enforced by order of the Interstate Commerce Commission; the remedy if any which the public may have in such case arises from the sanction of the common law and not from the Interstate Commerce Act; the power of the Interstate Commerce Commission under Sec. 15 is limited to enforce the duty of the carrier as defined by the statute; as the duty of the Telegraph Company towards the public in the distribution of market news and information as a private shipper or owner is not regulated by the Interstate Commerce Act or its amendments, it follows that the Interstate Commerce Commission could make no valid order requiring the Telegraph Company to furnish such service to Foster.

*U. S. Penn. R. R. Co.*, 242 *U. S.* 208 — (61:251)

Another insuperable objection to the jurisdiction of the Interstate Commerce Commission is that the transmission of the quotations from New York to Boston is merely an incident in the sale of the quotations in Boston by the Telegraph Company in its character of private shipper and owner; "it would be a perversion of language considering the sense in which it is used in the statute" to say that a Telegraph Company was engaged in the transmission of messages as a common carrier for hire, by sending the quotations in Morse Code from its New York office to its Boston office over its own wires to be there decoded for the purpose of selling such news and information for its own account to its various Boston subscribers by means of the ticker service.

*U. S. vs. Uncle Sam Oil Co., Case No. 507, Pipe Line Cases, 234 U. S. 548* — (58:1459)

The following is from the opinion by Mr. Justice Holmes in the above case — "There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma with a pipe line connecting the two, which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language considering the sense in which it is used in the statute to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When as in this case a company is simply drawing oil from its own wells across a state line to its own refinery for its own use and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

## POINT SIX

**ASSUMING AGAIN THAT THE SENDING OF THE QUOTATIONS FROM NEW YORK AND THE DISTRIBUTION IN BOSTON IS ONE INDIVISIBLE ACT AND THUS INTERSTATE COMMERCE, NEVERTHELESS THE COURTS OF MASSACHUSETTS UNDER THE PROVISIONS OF SEC. 22 OF THE INTERSTATE COMMERCE ACT, HAD JURISDICTION OF THE FOSTER SUIT BECAUSE THE DECISION OF THE ISSUE DID NOT INVOLVE THE DETERMINATION OF ANY MATTER REQUIRING THE EXERCISE OF THE ADMINISTRATIVE POWERS OR DISCRETION OF THE INTERSTATE COMMERCE COMMISSION OR RELATE TO A SUBJECT AS TO WHICH THE JURISDICTION OF THE FEDERAL COURTS IS OTHERWISE MADE EXCLUSIVE.**

### ARGUMENT

Sec. 22 of the Interstate Commerce Act reads as follows:—

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by Statute but the provision of this Act are in addition to such remedies."

Whenever one engages in the business of a common carrier the obligation to furnish equal service to all alike arises; and the obligation can be compelled by *mandamus* or other proper writ irrespective of Legislative Action or Special Mandate from any Administrative Board or Commission.

*Missouri Pa. R. R. Co. vs. Larrabee Flour Mills*, 211 *U. S.* 612 — (53:352)

The Foster Suit not involving any claim or proof that the Interstate Commerce Act was violated, nullified or evaded, and not involving any unjust discrimination with reference to a rate or charge, or any unjust practice under Sec. 15 of the Interstate Commerce Act and the refusal to furnish the quotations to Foster by means of the ticker service depending solely on the correct interpretation of a contract admitted not to be violative of the Act to Regulate Commerce, the State Court had jurisdiction to compel the Telegraph Company to perform its common law duties and to furnish to Foster the same service it was furnishing to others.

*Louisville & N. R. R. Co. vs. F. W. Cook Brew. Co.*, 223 *U. S.* 70 — (56:353)

*Penn. R. R. Co. & Sonman Shaft Coal Co.* 242 *U. S.* 120 — (61:188)

The Foster Suit was one that the Telegraph Company could have removed into the Federal Court in Massachusetts, under the claim that the Interstate Commerce Commission had sole jurisdiction; this claim was unfounded as it appears that the Interstate Commission had no jurisdiction whatever of the Foster Suit: But the claim alone was sufficient to give the Telegraph Company the Right to Remove, if it desired, a trial of the issues in the first instance by a Federal Tribunal.

*Louisville & N. R. R. Co. vs. F. W. Cook Brewing Co.*, 223 *U. S.* 70 — (56:353)

*Southern Pac. Co., vs. Stewart. U. S. Supreme Court Advance Opinions, Jan.* 15, 1918.

From the foregoing argument and authorities, it is respectfully submitted that the writ of error should be dismissed for want of jurisdiction or that the Decree of the Supreme Judicial Court of Massachusetts be affirmed.

PATRICK HENRY KELLEY
Attorney for CALVIN H. FOSTER
Defendant in Error

# SUBJECT INDEX.


PAGE

Statement of Case, . . . . . 1

Statutes:

Interstate Commerce Act: —

Section 1, . . . . . 14

Section 6, . . . . . 22, 43

Section 15, . . . . . 15

Massachusetts Public Service Commission Act, . . . . . 49

Argument:

I. Matter affected by order of the Public Service Commission does not constitute interstate commerce, . . . 7

II. Even if matter affected is held to constitute interstate commerce, the subject is open to State regulation until acted upon by Congress, . . . . . 11

III. Congress has not legislated with reference to any matters affected by the order of the Public Service Commission, 14

IV.. Even if the Interstate Commerce Act is held applicable, action by State tribunals is not inconsistent with it, . 21

V. Plaintiffs in error are not deprived of property without due process of law, . . . . . 35

# CITATIONS.


PAGE

American Rapid Telg. Co. *v.* Conn. Telp. Co., 49 Conn. 352, . . 31
Anglo-American Prov. Co. *v.* Davis Prov. Co., 191 U. S. 373, . 38
Atchison, Topeka & Santa Fé Ry. *v.* United States, 232 U. S. 199, 220, . . . . . 25
Austin *v.* Tennessee, 179 U. S. 343, . . . . . 10
B. & O. R.R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, . . . . 24
Bank of Augusta *v.* Earle, 13 Pet. 519, 589, 591, . . . . . 38
Bell Tel. Co. of Philadelphia *v.* Commonwealth *ex rel.* B. & O. Tel. Co., 3 Atlantic, 825, . . . . . 31
Bement *v.* National Harrow Co., 186 U. S. 70, 91, . . . . . 30
Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236, . 9, 32
Board of Trade *v.* McDearmott Comm. Co., 143 Fed. 188, 189, . 33
Boston *v.* Richardson, 13 Allen, 146, 160, . . . . . 39
Brass *v.* Stoeser, 153 U. S. 391, . . . . . 39
Central Union Telegraph Co. *v.* Bradbury, 106 Ind. 1, . . . . 12
Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399, 416, . . . . . 31
Chicago, Milwaukee & St. P. Ry. Co. *v.* Iowa, 233 U. S. 334, 343, 20, 40
Commercial Union Telegraph Co. *v.* New England Tel. & Tel. Co., 61 Vt. 241, . . . . . 31
Commonwealth *v.* People's Express Co., 201 Mass. 564, . . . . 9
Cook *v.* Marshall County, 196 U. S. 261, . . . . . 10
Cumberland Tel. & Tel. Co. *v.* Kelly, 160 Fed. 316, . . . . . 12
Delaware & A. Tel. & Tel. Co. *v.* State of Delaware, 50 Fed. 677, . 30
Delaware, Lackawanna & Western R.R. Co. *v.* United States, 231 U. S. 363, 370, . . . . . 36
F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62, . 9

PAGE

Friedman *v.* Gold & Stock Telegraph Co., 32 Hun. 4, . . . . 39
German Alliance Insurance Co. *v.* Kansas, 233 U. S. 389, 406, . 30
Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 293, . . . . . 31
Hooper *v.* California, 155 U. S. 648, . . . . . 38
Hunt *v.* New York Cotton Exchange, 205 U. S. 322, . . . . 32
Illinois Central R.R. Co. *v.* Louisiana R.R. Comm., 236 U. S. 157, 163, . . . . . 18
Illinois Central R.R. Co. *v.* Mulberry Coal Co., 238 U. S. 275, . 27
Ill. Comm. Co. *v.* Cleveland Tel. Co., 119 Fed. 301, . . . . 34
International Text Book Co. *v.* Pigg, 217 U. S. 91, . . . . 8
Interstate Amusement Co. *v.* Albert, 239 U. S. 560, . . . . 38
Kirmeyer *v.* Kansas, 236 U. S. 568, . . . . . 9
Knoxville Water Co. *v.* Knoxville, 189 U. S. 434, . . . . 34
Loomis *v.* Lehigh R.R., 240 U. S. 43, . . . . . 24
Louisville, etc., R.R. Co. *v.* United States, 238 U. S. 1, 20, . . 40
Louisville, etc., R.R. Co. *v.* West Coast Co., 198 U. S. 483, . . 38
Michigan Central R.R. Co. *v.* Michigan Railroad Commission, 236 U. S. 615, 631, . . . . . 40
Minnesota Rate Cases, 230 U. S. 352, . . . . . 11, 26
Missouri *ex rel.* B. & O. Tel. Co. *v.* Bell Tel. Co., 23 Fed. 539, . . 30
Missouri, K. & T. Ry. Co. *v.* Haber, 169 U. S. 613, 634, . . . 11
Missouri, K. & T. Ry. Co. *v.* Harris, 234 U. S. 412, 417, . . . 25
Missouri Pacific Ry. Co. *v.* Larabee Flour Mills, 211 U. S. 612, . 13, 26
Missouri Pacific Ry. Co. *v.* Nebraska, 217 U. S. 196, . . . . 38
Missouri Ry. Co. *v.* Mackey, 127 U. S. 205, . . . . . 37
Mitchell Coal Co. *v.* Penna. R.R. Co., 230 U. S. 247, . . . . 27
Mutual Film Corpn. *v.* Ohio Industrial Commission, 236 U. S. 230, 240, . . . . . 10, 19
New England Tel. & Tel. Co. *v.* Boston Terminal Co., 182 Mass. 397, 399, . . . . . 39
New York & Chicago Grain & Stock Exchange *v.* Board of Trade, 127 Ill. 153, 163, . . . . . 34, 39
New York & Queens Gas Co. *v.* McCall, 245 U. S. 345, . . . . 40

PAGE

New York *ex rel.* Pennsylvania R.R. Co. *v.* Knight, 192 U. S. 21, . 20
Ohio Railroad Commission *v.* Worthington, 225 U. S. 101, . . . 18
Oregon R.R. & N. Co. *v.* Fairchild, 224 U. S. 510, . . . . . 40
Orient Insurance Co. *v.* Daggs, 172 U. S. 557, 566, . . . . . 37
Osborne *v.* Florida, 164 U. S. 650, . . . . . 20
Paul *v.* Virginia, 8 Wall. 168, 181, . . . . . 38
Penna. Co. *v.* United States, 236 U. S. 351, 366, . . . . . 40
Penna. R.R. Co. *v.* International Coal Co. 230 U. S. 184, 197, . . 27
Penna. R.R. Co. *v.* Puritan Coal Co., 237 U. S. 121, . . . 27
Pierce *v.* Drew, 136 Mass. 75, 77, . . . . . 39
Postal Cable Telegraph Co. *v.* Cumberland T. & T. Co., 177 Fed. 726, . . . . . 12
Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, . . . 12, 28
Pullman Co. *v.* Adams, 189 U. S. 420, . . . . . 20
Rast *v.* Van Deman & Lewis, 240 U. S. 342, 360, . . . . . 10
Rearick *v.* Pennsylvania, 203 U. S. 507, . . . . . 19
Rhinehart *v.* Redfield, 87 N. Y. S. 789; s. c., 179 N. Y. 569, . . 39
Robinson *v.* B. & O. R.R., 222 U. S. 506, . . . . . 24
Shepard *v.* Gold & Stock Telegraph Co., 38 Hun. 338, . . . 39
Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 203, . . . . . 38
Smith *v.* Gold & Stock Telegraph Co., 42 Hun. 454, . . . 39
Southern Pacific Terminal Co. *v.* I. C. C., 219 U. S. 498, 519, 520, . 18, 38
Southern Ry. Co. *v.* Reid, 222 U. S. 424, 437, . . . . . 26, 28
St. Louis S. W. Ry. Co. *v.* United States, 245 U. S. 136, 145, . . 35
State *v.* Cadwallader, 172 Ind. 619, 642, . . . . . 12
State *ex rel.* Postal Tel. Co. *v.* Delaware & A. Tel. & Tel. Co., 47 Fed. 633, . . . . . 30
State *v.* Telephone Co., 36 Ohio St. 296, . . . . . 30
Texas & N. O. R.R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 126, . 18
Texas Ry. Co. *v.* Abilene Co., 204 U. S. 426, . . . . . 24
Union T. & S. Bank *v.* Tel. Co., 258 Ill. 202, . . . . . 34
United States *v.* Delaware & Hudson, 213 U. S. 366, . . . . 36
Vermilye *v.* Western Union Telegraph Co., 207 Mass. 401, . . . 11
Weems Steamboat Co. *v.* People's Co., 214 U. S. 345, . . . . 38

PAGE

Western Oil Refining Co. *v.* Lipscomb, 244 U. S. 346, . . . 18, 19
Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 12, 28
Western Union Telegraph Co. *v.* Crovo, 220 U. S. 364, . . . 11, 12
Western Union Telegraph Co. *v.* James, 162, U. S. 650, . . . 11
Western Union Telegraph Co. *v.* Wilson, 213 U. S. 52, 55, . . 11, 12
Wisconsin, etc., R.R. Co. *v.* Jacobson, 179 U. S. 287, . . . 40

# In the
# Supreme Court of the United States.

October Term, 1917.

---

No. 274.

WESTERN UNION TELEGRAPH COMPANY AND UNITED TELEGRAM COMPANY, PLAINTIFFS IN ERROR,

*v.*

CALVIN H. FOSTER AND FREDERICK J. MACLEOD *et al.*, MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, DEFENDANTS IN ERROR.

---

No. 275.

WESTERN UNION TELEGRAPH COMPANY AND UNITED TELEGRAM COMPANY, PLAINTIFFS IN ERROR,

*v.*

FREDERICK J. MACLEOD *et al.*, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANTS IN ERROR.

---

## *BRIEF FOR DEFENDANTS IN ERROR:*

## MASSACHUSETTS PUBLIC SERVICE COMMISSION.

---

### STATEMENT.

These cases were originally instituted in the Supreme Judicial Court of Massachusetts, the first by the telegraph companies to review and reverse an order of the

Massachusetts Public Service Commission, and the second brought by the Public Service Commission to compel enforcement of said order.

Complaint had been made to the Public Service Commission by one Foster, in effect charging the plaintiffs in error with unlawful discrimination, in that they were refusing to furnish Foster a stock ticker, and by means thereof continuous quotations of the New York Stock Exchange, although supplying such service to others generally.

The Public Service Commission found that unlawful discrimination in fact existed, and ordered the same removed. This order has been affirmed by the courts of last resort in Massachusetts, and in the second suit decree has been entered commanding compliance with the order. The errors assigned to this court are that the Public Service Commission was without jurisdiction of the subject-matter, in that the same was exclusively within the jurisdiction of the Interstate Commerce Commission, and that the decrees in effect deprive the plaintiffs in error of property without due process of law. (Rec., pp. 76, 78.)

The findings of fact of the Public Service Commission were not questioned by the plaintiffs in error in either proceeding. (Rec., pp. 5, 61.)

By these findings (Rec., pp. 7–20) it appears that the telegraph companies are furnishing in Boston so-called ticker service to stock brokers and others. Quotations or records of sales of stock made on the New York Stock Exchange are collected by its employees and, under contract for a substantial consideration in money, are delivered in New York to the telegraph companies' agents. Said contracts contain stipulations

to the effect that the quotations shall not be furnished by continuous ticker service "to any subscriber therefor unless the subscriber shall have signed in duplicate an application therefor, addressed to the telegraph company, and the subscriber shall have been approved by the Exchange." (Rec., p. 11.) Continuous ticker service "is defined to be oftener than at intervals of fifteen minutes." (Rec., pp. 43, 51.)

The quotations so received in New York are transmitted to the office of each company in Boston. The United Telegram Company, after receipt of the quotations by it in New York, causes them to be sent by wires of the Postal Telegraph Company to the office of the United Telegram Company in Boston. (Rec., p. 9.) Immediately upon receipt in Boston they are handed to an employee operating the keyboard of the transmission instrument for the ticker system, and thereby written simultaneously by means of the so-called ticker instruments upon a tape of paper in the office of every patron, where they can be easily read.

The Western Union transacts its ticker business under the name of the Gold and Stock Telegraph Company, a distinct corporation. All the appliances and property of the Gold and Stock Telegraph Company are leased to the Western Union. The contract with the Stock Exchange is made by the Western Union and the quotations are delivered at the main office in Boston of the Gold and Stock Telegraph Company over a wire of the Western Union. (Rec., p. 9.) Otherwise the operations of the two companies are the same.

The transmission from New York to Boston is made "by means of the Morse code, and upon receipt at the offices of the telegraph companies in Boston the infor-

mation so transmitted is translated into words and numerals in the ordinary alphabet, and it is in such words and numerals that the ticker systems in Boston of the United Telegram Company and the Gold and Stock Telegraph Company are operated." (Rec., pp. 9, 10, 19.)

Foster applied to each company for this ticker service, upon application forms prescribed by the contracts between the Stock Exchange and the telegraph companies, which were transmitted by each company to the Stock Exchange for its approval. The Stock Exchange did not approve the applications, and the telegraph companies refused to install the ticker service (Rec., pp. 6, 8, 23, 49, 66.)

Foster thereupon applied to the Public Service Commission to be furnished with the service. He alleged in his petition that he had been engaged for a long time in the stock brokerage business in Boston, and had previously been furnished with tickers, which were removed in 1914; that he had applied for a renewal of the service, had appeared before the appropriate committee of the New York Stock Exchange on two different occasions, where he had submitted himself to an examination and answered all questions asked; and that in conducting his business he always has complied with the laws of this Commonwealth, and does not desire the quotations and ticker service for any unlawful or improper purpose, but for use in his legitimate brokerage business.

The respondents filed answers to Foster's complaint, and a public hearing was held, but the foregoing allegations were not denied by the respondents. (Rec., pp. 6, 8.)

The Commission found that the petitioner was ready and willing to pay the price charged to other patrons for ticker service, and to comply with all reasonable rules and regulations, and that the telegraph companies simply relied upon the fact that the New York Stock Exchange had notified them that the petitioner's applications had been disapproved, without assigning any reason whatsoever for such disapproval; and that there was no evidence that the petitioner desired the quotations for unlawful or improper use. (Rec., pp. 8, 67.)

The Commission finally found that the telegraph companies were guilty of unjust and unlawful discrimination, in that they had without just cause denied and refused to supply to Foster the continuous quotations of the Stock Exchange by means of ticker service, now furnished and supplied to others; and that *if they furnished or supplied to any customer in Boston such quotations* they must furnish or supply them, without such discrimination, to all customers within the district or districts supplied by their respective services who would comply with all lawful regulations connected with said service, and who desire said quotations for lawful and proper use. (Rec., p. 20.) They did not grant the prayer of Foster, but, acting under the powers granted by the Public Service Commission act to order removed an unlawful discrimination found to exist after hearing had either with or without complaint, entered awards that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company "shall forthwith remove said discrimination." (Rec., p. 20.)

St. 1913, c. 784, constitutes the Public Service Commission law of Massachusetts, the pertinent provisions

of which are printed at the end of this brief. Certain facts with relation to it should be recognized at the start. While in some respects it follows or is similar to the Interstate Commerce Commission law, in others it is broader in application and remedy.

(*a*) Its jurisdiction over telegraph and telephone companies is not limited, as that of the Interstate Commerce Commission, to such companies "engaged in sending messages," but jurisdiction is given over companies engaged in the transmission of intelligence by electricity, including the operation of all conveniences, appliances, instrumentalities or equipment utilized in connection therewith or appertaining thereto.

(*b*) Companies within the application of the act are forbidden to extend to any person or corporation any rule, regulation, privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances for the like or substantially similar service. (Section 20.)

It is to be noticed that although Foster applied for an order requiring the service to be furnished to him (Rec., p. 21), and in the application of the Public Service Commission to the Supreme Judicial Court for enforcement of its order a similar prayer was made (Rec., p. 60), the order entered both by the Public Service Commission and by the court was an order made under the provision quoted above requiring the companies to forthwith remove the discrimination. (Rec., pp. 20, 65.)

## ARGUMENT.

### I.

### MATTER AFFECTED BY ORDER OF THE PUBLIC SERVICE COMMISSION DOES NOT CONSTITUTE INTERSTATE COMMERCE.

In order to determine whether or not interstate commerce is directly affected it is necessary at the start to recognize clearly what occurs in the present case.

Application is made in Massachusetts for certain service to be rendered in Massachusetts by corporations regularly doing business in Massachusetts. These corporations regularly receive information as to sales made upon the New York Stock Exchange. That information is received in the first instance in New York, and transmitted by interstate telegraph wires to offices of each corporation in Boston. No question is raised but that the transmission from the agent in New York to the agent in Boston constitutes an interstate transaction. However, this interstate communication is made over a wire independent from the ticker system, by ordinary telegraph means, in the Morse code. In the case of the United Telegram Company the information is transmitted through the agency of an entirely independent public service corporation, to wit, the Postal Telegraph Company.

The information having come to the knowledge of the corporations' officers in Boston, the operation of a ticker system comes into play. By a new transmission instrument and an independent system of wires and receiving instruments the operator at the main office of

each company causes to be written in the various brokers' offices, upon the tickers there, the quotations, which are in ordinary English letters and numerals.

If an individual had compiled this information in New York, taken train to Massachusetts, and after arrival there disclosed his knowledge either by lecture or publication in print, it would hardly be contended that the lecture or publication was not subject to State control, on the ground that the information had been acquired in one State and was being distributed in another. It would be plain that the interstate journey had ended. The essential features of this business cannot be altered by reason of the fact that corporations rather than individuals are concerned, or that modern inventions have made greater speed possible. The interstate transaction, to wit, the communication from the agent in New York to the agent in Boston is in no way regulated or affected by the requirement that all persons in Massachusetts must be treated alike. The case of International Text Book Co. *v.* Pigg, 217 U. S. 91, is not in point, since there the communication was direct, by mail, from the company in Pennsylvania to the pupil in Kansas (see at page 100).

The information received by the companies in Boston is distributed to divers customers there. If the companies' agents, after receipt of the information, had proceeded to set it up in type, strike off a hundred copies and send one by messenger to each of a hundred customers, it would seem clear that the interstate transaction was completed when the agent in Boston received the information, and that the business of printing the copies and distributing them should be regarded as entirely intrastate matter. Can it make

any difference that the printing machine is set up in the customer's office and operated simultaneously with ninety-nine like machines in other offices? The interstate transmission ceased before the retailing operation began, just as when the owner of goods begins retailing them out to different customers within the State the interstate transit has ceased.

Commonwealth *v.* Peoples Express Co., 201 Mass. 564.
Kirmeyer *v.* Kansas, 236 U. S. 568.

The present case cannot correctly be regarded as an interstate transportation of property by the owner, the telegraph company, from New York to Boston, and a sale by the company in Boston of the property transported. While there doubtless is a property right in the quotations collected by the New York Stock Exchange, that right cannot properly be regarded as a commodity. So far as a property right exists it is a right to keep to oneself or to publish or communicate to others the matter collected.

Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236.
F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62.

This right or property is not conveyed to the various brokers who are supplied with the tickers. The contract under which they receive the service expressly excludes that idea. [Exhibit C, p. 44, par. (2); p. 52, par. (2).] In furnishing the quotations to the brokers the telegraph companies are exercising the property

right derived by them from the Stock Exchange, under contract, but in no sense are they selling or transferring the same.

However, even if this transaction is regarded in reality or for purposes of analogy, as a transfer of property, the retailing out of property to a hundred different customers in Boston which has been received by one interstate shipment would be subject to the police regulations of the State. So far as the communication of this information is spoken of as a sale of "news" it is applying an analogy to a sale of goods, and the principle of breaking bulk seems properly to be applied to such analogy, and would bar any claim to exemption from State regulation.

Even the doctrine of special immunities inherent in an "original package" does not nullify police regulation by a State as to retail trade.

Austin *v.* Tennessee, 179 U. S. 343, and cases cited. (Cigarettes in boxes of ten, shipped loose into State.)

Cook *v.* Marshall County, 196 U. S. 261. (Cigarettes in small packages.)

Rast *v.* Van Deman & Lewis, 240 U. S. 342, 360. (Trading Stamp Case.)

There must be some time when a subject-matter, although moving in interstate commerce, becomes subject to State control.

Mutual Film Corpn. *v.* Ohio Industrial Commission, 236 U. S. 230, 240.

The fact that it is physically impossible to operate ticker instruments in Boston by means of a transmitter

located in New York, and that, accordingly, it is necessary to use the Morse telegraph system for the transmission from New York to Boston would seem to strengthen the claim that the interstate character of the transmission ceased when that transmission ended, rather than to operate as claimed by the appellants.

## II.

### EVEN IF MATTER AFFECTED IS HELD TO CONSTITUTE INTERSTATE COMMERCE, THE SUBJECT IS OPEN TO STATE REGULATION UNTIL ACTED UPON BY CONGRESS.

The power of a State to regulate common carriers, even though interstate commerce is incidentally affected, is well established, and such regulations remain effective until such time as Congress may act upon the matter.

Western Union Telegraph Co. *v.* Crovo, 220 U. S. 364.
Minnesota Rate Cases, 230 U. S. 352.
Vermilye *v.* Western Union Telegraph Co., 207 Mass. 401.

Such statutes are not regulations of interstate commerce but proper police regulations for the enforcement of the rules and policies of the common law.

Western Union Telegraph Co. *v.* James, 162 U. S. 650.
Missouri, K. & T. Ry. Co. *v.* Haber, 169 U. S. 613, 634.
Western Union Telegraph Co. *v.* Wilson, 213 U. S. 52, 55.

In Western Union Telegraph Co. *v.* Crovo, 220 U. S. 364, it was held that the imposition by State statute of a penalty for failure to perform a common law duty is, in the absence of legislation by Congress, within the power of a State if it relates to the portion of the service performed within the State.

The requirement of the Massachusetts statute that the telegraph companies shall serve all citizens without unfair or unreasonable discrimination is but an enforcement of a common law duty. "Telegraph companies resemble railroad companies and other common carriers, in that they exercise a public employment, and are, therefore, bound to serve all customers alike, without discrimination".

Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S 92.

Cumberland Tel. & Tel. Co. *v* Kelly, 160 Fed. 316.

Postal Cable Telegraph Co. *v.* Cumberland T. & T. Co., 177 Fed. 726.

Central Union Telegraph Co. *v.* Bradbury, 106 Ind. 1.

State *v.* Cadwallader, 172 Ind. 619, 642.

"In the absence of any action on the part of Congress at least it would not be denied that the State could regulate the conduct of local messengers when the transit by wire was over."

Western Union Telegraph Co. *v.* Wilson, 213 U. S 52.

The principle of the Wilson case can hardly be affected if a messenger is dispensed with and a telephone employed instead, or, going a step further, if a ticker instrument is set up and by that means the local messenger dispensed with.

Surely, if it is lawful for a State to enforce the common law duty by means of a penalty, as was done in the Crovo case, it may provide a more perfect means of enforcement by specific order of a commission, and equitable relief.

In Missouri Pacific Ry. Co. *v.* Larabee Flour Mills, 211 U. S. 612, mandamus was issued by a State court to compel the furnishing of facilities to a certain shipper in the same manner as supplied to others, although three-fifths of the cars affected were moving in interstate commerce. Such action and remedy were approved by this court. There is no essential difference between that case and the present: There mandamus was employed to prevent unjust discrimination, while in the present case the remedy in equity attains the same end. It was said by Mr. Justice Brewer (p. 619):

"While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy. . . . Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts."

## III.

CONGRESS HAS NOT LEGISLATED WITH REFERENCE TO ANY MATTERS AFFECTED BY THE ORDER OF THE PUBLIC SERVICE COMMISSION.

The only legislation of Congress which it is suggested can apply to these matters is found in the Interstate Commerce Act, and the only language therein directly relating to telegraph companies is the following:

SECTION 1. (Act of June 18, 1910.) The provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, . . . and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, . . . *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivery, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

. . . . . .

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be un-

lawful: *Provided*, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

. . . . . .

SECTION 15. (As amended by Act June 18, 1910.) That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such trans-

portation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. . . .

As set forth in the opinion of the Public Service Commission (Rec., pp. 18-19), this legislation of Congress has reference only to transmission of *messages*, and does not cover the broad ground dealt with by the Massachusetts act. The classification of rates to be filed indicates the subject-matter included in the word "messages," and excludes the idea of the kind of service furnished by the stock ticker. The classification mentioned in the act is "into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable." Each one of these classes confirms the general idea which the word "message" suggests, and calls for a sender and a recipient thereof. It is difficult to see how the telegraph companies are transmitting a message when there is no party sending the same. Each of the classes mentioned in the act would possess such a characteristic. The essential feature of the business of the telegraph companies here in question is not the "transmission of messages" but furnishing of information to the various customers supplied with the ticker service, by means of the facilities which it possesses in the public streets and ways.

The plaintiffs in error appreciate the force of this contention, and claim that under the agreements between the Stock Exchange and the telegraph companies the former contracts for sending messages to the various brokers, and that the telegraph companies are merely performing their ordinary functions of common carriers of messages sent by the Stock Exchange.

It is hard to find any phrase of these contracts which lends support to that contention. The reasons for its rejection, stated in the opinion of the Massachusetts Supreme Judicial Court, seem unanswerable. (224 Mass. 369–371; Rec., pp. 67–69.)

The contracts are found in the record (pp. 40–48 and 50–56). The following main features thereof stand out:

(*a*) The Stock Exchange collects and "furnishes" the information to the telegraph companies (pp. 41, 50).

(*b*) There is a covenant against liability of the Stock Exchange for inaccuracies (pp. 41, 50).

(*c*) For this information the Stock Exchange receives $50,000 per annum from the Western Union and $9,000 from the United Telegram Company (pp. 47, 55).

(*d*) The Stock Exchange pays nothing whatever to the telegraph companies.

(*e*) The telegraph companies may deliver the information to any one whomsoever outside a certain area, provided it is not in the volume of a continuous service (pp. 43, 51).

(*f*) The Stock Exchange has no contractual relation with the subscribers.

(*g*) The contract speaks of the subscriber as a "patron" of the telegraph companies, not of the Stock Exchange (p. 45).

(*h*) If the telegraph companies choose entirely to cease delivering the quotations it would infringe no right of the Stock Exchange under the contract.

It is fair to say that "message" was never before applied to a case where the alleged sender had no right to have it delivered, no right to have its contents secret after the lapse of fifteen minutes, was under no obligation to pay for its transmission, and received a substan-

tial payment from the carrier for rendering the alleged service to it.

If the transaction in the present case can be regarded in any light as the sending of an interstate message it is a message from the telegraph company in New York to the telegraph company itself in Boston, and so far as such interstate transaction is concerned it is then completed. At that point there is a distinct change in relations. The message, if it is one within the meaning of the act, has come in the Morse code, is translated, and the companies' agents are then in a position to retail the information to as many different customers as is seen fit, provided it is not a continuous service, as well as to the many different customers supplied with such service. This retailing out of the information is a new and distinct transaction. It may be by ticker, as in the case of the continuous service, or by publication in any other manner seen fit.

It is recognized that in the transportation of merchandise the rule is established that mere breaking of transit, separate bills of lading and the like do not necessarily destroy or terminate the interstate character of the transportation.

Western Oil Refining Co. *v.* Lipscomb, 244 U. S. 346.

Texas & N. O. R.R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 126.

Southern Pacific Terminal Co. *v.* I. C. C., 219 U. S. 498.

Ohio Railroad Commission *v.* Worthington, 225 U. S. 101.

Illinois Central R.R. Co. *v.* Louisiana R.R. Comm., 236 U. S. 157, 163.

In the first and last cases cited it is implied at least that the interstate character of the movement does cease when the movement originally intended by the parties has ceased. In Western Oil Refining Co. *v.* Lipscomb, *supra*, oil shipped from without the State was drawn out of tank cars in exact quantities ordered by specific customers and delivered directly to them. A different situation would have been presented if the oil had been placed in bulk in a warehouse of the oil company in Tennessee and then divided and delivered, or if it had been shipped in quantity in excess of orders obtained, and the balance open to distribution to further customers. In this and similar cases relied on by plaintiffs in error, such as Rearick *v.* Pennsylvania, 203 U. S. 507, there is some definite property sold or assigned to a particular customer prior to the shipment or segregated for him at its termination. In the present case the information as delivered to the companies' agents at the termination of the direct interstate transmission cannot be so identified. It is knowledge or information possessed then by the telegraph companies in Massachusetts. It is subject to a transmutation in form from Morse code to plain English, and to reduplication on many machines in customers' offices, and the same information so received may be disposed of, otherwise than in continuous service, to whomsoever the companies see fit. (Rec., pp. 43–51.) Certainly a time comes when interstate transit is at an end.

Mutual Film Corpn. *v.* Ohio Industrial Commission (*supra*).

The independent character of the transactions in Massachusetts after receipt of the information is

somewhat analogous to the rulings with reference to a cab service operated by a railroad for transportation solely of interstate passengers.

New York *ex rel.* Pennsylvania R.R. Co. *v.* Knight, 192 U. S. 21.

In that case it is said:

So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation. Osborne *v.* Florida, 164 U. S. 650; Pullman Co. *v.* Adams, 189 U. S. 420. (Page 26.)

As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction. (Page 27.)

See also Chicago, Milwaukee & St. P. Ry. *v.* Iowa, 233 U. S. 334, 343.

The transmission from New York to Massachusetts cannot be regarded as a message either of the Stock Exchange or of the telegraph company in New York to the various brokers in Boston, because if such were

the case there could be no right of disclosure of the contents of such messages to other persons in Boston than those to whom the messages were being transmitted. The right of the Western Union to deal with the information as it sees fit stamps the communication from New York to Boston as a communication from itself in New York to itself in Boston rather than to such brokers or persons as may be supplied with a ticker service.

## IV.

### Even if the Interstate Commerce Act is held applicable, Action by State Tribunals is not inconsistent with it.

If it should be held that the service rendered by the telegraph companies is included within the provisions of the Interstate Commerce Act, as amended, and constitutes the transmission of interstate messages, it is, nevertheless, submitted that the present case, on its face, was within the jurisdiction of the State tribunals which acted upon it.

It must be borne in mind that even though it be held that section 1 of the Interstate Commerce Act includes within the phrase "transmission of messages by telephone, telegraph, or cable," such operations as here in question, still many of the sections of the act which are applicable to railroads and carriers engaged in the transportation of persons or property cannot, from their terms, apply to telephone and telegraph companies.

Thus section 6, by its words and phrases, excludes telephone and telegraph companies from its provisions.

Section 6 (substituted by act of June 29, 1906; amended June 18, 1910, and August 24, 1912):

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for *transportation* between different points on its own route and between points on its own *route* and points on the *route* of any other *carrier* by *railroad*, by *pipe line*, or *by water* when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through *transportation*. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which *property* and *passengers* will be carried, and shall contain the classification of *freight* in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the *passenger*, *shipper*, or *consignee*. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where *passengers or freight*, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

. . . . . .

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of *passengers or prop-*

*erty*, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of *passengers or property*, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the *transportation* of *passengers or property*, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier." (Italics ours.)

The entire provisions of this section are hereto annexed.

It seems clear from what has been quoted above that this section relates solely to carriers engaged in the transportation of passengers or property and facilities furnished in connection therewith. It was amended by the same act which brought telephone and telegraph companies within the provisions of the Interstate Commerce Act (amendment of June 18, 1910), and the fact that its language was not so changed as to include such companies seems clearly to show the intention of Congress that these provisions should not apply to them.

It is understood that the Interstate Commerce Commission in practice does not allow the filing of rates under this section by telephone and telegraph companies, and their rulings do not call therefor.

The foregoing distinction must be kept in mind at all times because of the many cases in which it is held

that the power of a State to regulate carriers in the absence of legislation by Congress, has been superseded by the requirements of section 6 of the act, as now amended, relating to the filing of rate schedules showing all charges and "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges or the value of the service rendered to the passenger, shipper, or consignee."

The duty of a common carrier to serve any member of the public in the same manner as the public generally, declared by the Massachusetts statute and enforced by the Public Service Commission and State court, is but a common-law duty, as hereinbefore set forth (page 12).

It is, of course, recognized that the rectification of certain forms of unjust discrimination, especially since section 6 of the Interstate Commerce Act was amended to its present form, is solely within the jurisdiction of the Interstate Commerce Commission.

Texas Ry. Co. *v.* Abilene Co., 204 U. S. 426.
B. & O. R. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481.
Robinson *v.* B. & O. R.R., 222 U. S. 506.
Loomis *v.* Lehigh R.R., 240 U. S. 43.

These and similar cases it is believed all involve the rate making function or questions of discrimination dependent, on final analysis, on decision of facts; in other words, they properly call for the exercise of the administrative functions and discretion vested in the Interstate Commerce Commission. The reason for

the decision that State control is excluded is stated thus in the last-mentioned case, at page 50:

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, Topeka & Santa Fé Ry. v. United States, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court."

On the other side are numerous cases in which the jurisdiction of State courts to redress wrongs which do not call for the exercise of such functions has been applied. The mere fact that the Interstate Commerce Commission has been given jurisdiction over telephone and telegraph companies to a certain extent does not oust State control nor divest State courts of jurisdiction.

In Missouri, K. & T. Ry. Co. v. Harris, 234 U. S. 412, 417, it is said:

. . . It is of course settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, State laws upon the same subject are superseded. . . . But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the

Commission or by Congress itself, interfere with the authority of the States to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with. . . .

In the Larabee Mills Case it was held that the railroad company, by engaging in the business of a common carrier, had become subject to certain duties imposed upon it by general law, including the obligation to treat all shippers alike; that the enforcement of this duty and the regulation of matters pertaining to it were within the authority of the State, although interstate commerce was thereby indirectly affected; and that until specific action by Congress or the Commission, the control of the State over such incidental matters remained undisturbed. Hence, a decision by the Supreme Court of Kansas, awarding a mandamus to require the company to restore the service of transferring cars between the lines of another railroad and the Larabee Mills and Elevator, in aid of interstate and intrastate shipments alike, was affirmed. This case arose after the enactment of the Hepburn Act.

Missouri Pacific Ry. Co. *v.* Larabee Flour Mills, *supra.*

In Southern Ry. Co. *v.* Reid, 222 U. S. 424, at 437, it is said:

"The principle of that case" (Larabee Mills case) "requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the matters which the statute of North Carolina attempts to regulate."

Minnesota Rate Cases, 230 U. S. 352.

Even in cases within the provisions of section 6 of the Interstate Commerce Act State courts have juris-

diction to redress a wrong arising from the fact that the carrier is discriminating between members of the public by not complying with the rules and regulations filed by it with the Interstate Commerce Commission.

Thus in Mitchell Coal Co. *v.* Penna. R.R. Co., 230 U. S. 247, it is said:

> Paying the favored consignee for rendering a service the carrier was not bound to furnish, was a gift — a rebate — a thing *ipso facto* illegal and prohibited by the statute and for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court. It was therefore not necessary to have a preliminary ruling by the Commission because the statute itself prohibited the payment of rebates and the courts could apply the law accordingly.

In Penna. R.R. Co. *v.* International Coal Co., 230 U. S. 184, at 197, the court said:

> The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class.

Penna. R.R. Co. *v.* Puritan Coal Co., 237 U. S. 121.

Illinois Central R.R. Co. *v.* Mulberry Coal Co., 238 U. S. 275.

In the present case no question of discretion is involved. No balancing of circumstances or conditions surrounding the carrier or the members of the public dealing with the carrier is required. One member of

the public is denied service by a common carrier, not on the ground that no rates have been filed and, consequently, transportation was forbidden, as in the case of Southern Ry. Co. *v.* Reid, 222 U. S. 424, but for the sole reason that a third party, to wit, the New York Stock Exchange, had not approved his application for service. (Rec., p. 8.)

As matter of law this furnishes no reason for the action taken. A common carrier cannot at common law refuse service to any member of the public for such a reason. Common carriers are bound to serve all customers alike, without discrimination.

Primrose *v.* Western Union, 154 U. S. 1.
Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92.

There is no room here for varying decisions by different tribunals. A clear cut question of law only is presented, where discretion has no field. Can such a carrier limit its ability to serve all the public alike by acquiring facilities subject to the approval of a third party as to what members of the public shall be served? To that question but one answer should be possible.

The argument that this duty to the public, required by statute and common law, may be defeated by reason of contracts under which the facilities furnished to the public are acquired by the public service corporation, has frequently been advanced, and, so far as known, with one exception has been rejected by the appellate courts to which it has been presented.

The property rights of the New York Stock Exchange or the telegraph company in the stock quotations can

be no more privileged or sacred than rights acquired under and by virtue of United States letters patent.

In the early days of the telephone business the parent Bell company, a Massachusetts corporation, licensed the use of its telephones by local companies in various communities, and provided therein that telephones should not be installed in telegraph offices except with its permission and on such terms as it prescribed. It then permitted telephones in the offices of the Western Union but not in the offices of other and competing telegraph companies. Proceedings in various forms were brought by or in the interest of the competing companies to obtain the same service as that accorded to the Western Union Telegraph Company. Practically the same situation, therefore, was presented as in the present case. The Bell Company, having the absolute ownership of the patents, was attempting to license their use, reserving to itself the right of saying as to a certain class of customers, who should be served and who should not be served, just as in the present case the Stock Exchange is licensing the use of its information and attempting to dictate as to all customers what members of the public shall or shall not be served.

The following cases all presented substantially the situation set forth above, and in all the argument was rejected and the duty of serving all the public alike without discrimination was declared to be paramount and controlling. The Circuit Court of Appeals of the Third Circuit, in an opinion rendered by Butler, D. J., used the following language:

(Page 678.) While such companies are not required to extend their facilities beyond such reasonable limits as they pre-

scribe for themselves, they cannot discriminate between individuals of classes which they undertake to serve.

(Page 679.) Nor does it help the respondent to say that the license could not be obtained on other terms. If not, it could have been declined. Had it been, and the business avoided, the responsibilities which attend it could also have been avoided. Accepting the license, however, as the respondent did, and engaging in the carriage of messages, it cannot escape the public duties which attend the employment. It must carry for all persons belonging to the classes it undertakes to accommodate.

Delaware & A. Tel. & Tel. Co. *v.* State of Delaware, 50 Fed. 677.

State *ex rel.* Postal Tel. Co. *v.* Delaware & A. Tel. & Tel. Co., 47 Fed. 633.

Missouri *ex rel.* B. & O. Tel. Co. *v.* Bell Tel. Co., 23 Fed. 539.

These three cases are cited with evident approval by this court in

Bement *v.* National Harrow Co., 186 U. S. 70, at 91.

In Ohio it was said:

The Columbus Telephone Co. was bound to acquire from the American Bell Telephone Co. such rights in its instruments and patent (or to provide itself by other means with all such facilities) as were necessary to discharge its duties to the public as prescribed in the statute; otherwise it had no right to engage in the business of operating a system of telephones at all.

State *v.* Telephone Co., 36 Ohio St. 296.

In Vermont mandamus issued to compel furnishing the facilities.

Commercial Union Telegraph Co. *v.* New England Tel. & Tel. Co., 61 Vt. 241.

In Maryland the court said:

ALVEY, C.J. The license to use the telephone instruments in conducting and operating a telephone exchange, at once dedicated or devoted the instruments, to the extent of the requirements of that system or exchange, to public use; and so soon as the office of exchange was opened to the public, the instruments employed became instruments of public service, and like all other property employed in the service, became subject to public regulation and control. And the fact that those instruments were the product of a patented invention or discovery, and the licensee had agreed to use them in serving the public with certain restrictions, inconsistent with the public regulation, can in no way, nor to any extent, relieve the party in control of the Exchange from the full discharge of his duty under the law.

Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399, 416.

*Acc.* Bell Tel. Co. of Phila. *v.* Commonwealth, *ex rel.* B. & O. Tel. Co., 3 Atlantic, 825.

*Contra* American Rapid Telg. Co. *v.* Conn. Telp. Co., 49 Conn. 352.

In Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, at 293 (C. C. A., 6th cir.), the court says:

LURTON, C.J. The conclusion to be drawn from these telephone cases is this: That when a patentee authorizes the use of his invention by one charged with public duties, and subject to regulation by law, it is not competent, by a restriction on the use, to deprive the licensee of the power of rendering an equal service to all who apply and tender the compensation fixed by law or regulation for the same service to others. The patentees were under no obligation to license the use of their inventions by any public telephone company. Having done so, however, they were not at liberty to place restraints upon such a public corporation which would disable it from the discharge of all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company, and could not exercise the franchise of a common carrier of messages, with such exceptions in the grant; the exception, being repugnant to the grant, was void; and the rights acquired under the grant were enforced against the grantor, without regard to the exception or condition.

If the monopoly which a United States patent is designed to secure is subject to the limitations laid down by the foregoing decisions, the property right which on grounds of equity and fair dealing has been by the common law accorded to the collector of valuable information should on the same ground of equity and fair dealing with the public be subjected to at least as sweeping a limitation in the public interest.

The following cases in this court in no way affect the foregoing:

Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236.

Hunt *v.* New York Cotton Exchange, 205 U. S. 322.

The first-named case merely decided that a party who obtained quotations *surreptitiously* should be restrained from publishing them and thereby indirectly depriving the owner of the enjoyment of his property. "By that opinion it is established that the complainant has a property right in the quotations so collected by it; that it may rightly restrict the use thereof for lawful purposes, *without discrimination*, to those who will contract and pay for such use; and that it is entitled to be protected in such rights."

Board of Trade *v.* McDearmott Comm. Co., 143 Fed. 188, 189 (C. C. Mo. 1906).

The Hunt case came to the United States Supreme Court only upon the question of the jurisdiction of the Circuit Court to issue a preliminary injunction enjoining a person who had not made application to be furnished with the quotations upon a form which contained an agreement against republishing or communicating the quotations to others, from receiving such quotations, although a State court had enjoined the removal of a ticker from Hunt's office. Only two points were argued before the court: First, the question of whether the jurisdictional amount of $2,000 was involved; and second, whether the pendency of the suit in the State court prevented the Circuit Court from taking jurisdiction. The question of the validity of any provision in the contract between the Board of Trade and the telegraph company, which would permit or require discrimination as to the public served by the telegraph company was not presented or discussed.

It is a very different matter to say that the owner of the quotations may stipulate that they shall not be furnished to any one who does not in turn agree not to republish them or use them in such a way that the owner's right of publication may be rendered valueless than it is to say that the owner may furnish them to a telegraph company in such a way as to prevent that public service corporation from performing its full duty to the public.

*Cf.* New York & Chicago Grain & Stock Exchange *v.* Board of Trade, 127 Ill. 153.
Union T. & S. Bank *v.* Tel. Co., 258 Ill. 202.
Knoxville Water Co. *v.* Knoxville, 189 U. S. 434.
Ill. Comm. Co. *v.* Cleveland Tel. Co., 119 Fed. 301.

Accordingly, it is submitted that on the facts in this case a violation of law on the part of the telegraph companies was shown, and, accordingly, could be corrected by decree of the State tribunal, just as in the cases of illegal acts of rebating or departure from the rules and regulations shown by a filed tariff of a railroad. If in such cases as the latter a State court has jurisdiction to award damages, it would seem that it should have jurisdiction to give the more complete remedy of requiring the discontinuance of the unlawful acts.

## V.

### TELEGRAPH COMPANIES NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It is argued that the plaintiffs in error are deprived of property without due process of law because they are obliged to give the information which is their property to the applicant therefor, and because to do so will make them break their contracts with the Stock Exchange, and therefore destroy their enforcibility.

One answer to this contention is that no such order has been made upon them. The telegraph companies have not been ordered to furnish quotations, but merely to remove the discrimination found to exist. Both the Public Service Commission and the Massachusetts court were asked to enter an order that Foster be supplied with the ticker service and quotations, but these prayers were refused, and instead an order entered for removal of the discrimination (*supra*, p. 5).

The order to remove discrimination permits the telegraph companies either to acquire the right to furnish the service to Foster or to cease supplying such service to any one in Massachusetts. If the telegraph companies choose to follow a course which would break their contracts, it is a result of their own volition in choosing so to do.

The option left open to the carrier under an order in this form is recognized in St. Louis S. W. Ry. Co. *v.* United States, 245 U. S. 136 at 145.

The order really requires the companies to cease doing the business unless they serve all alike, without discrimination, and is authorized by the requirement of the Massachusetts Public Service Commission act (St.

1913, c. 784, § 20), to the effect that corporations within the jurisdiction of the Public Service Commission shall not "extend to any person or corporation any rule, regulation, privilege or facility except such as are . . . uniformly extended to all persons and corporations under like circumstances for the like or substantially similar service."

This requirement is a valid exercise of the police power. The Legislature may well determine that public convenience and welfare require that common carriers shall not engage in any collateral business unless they serve all members of the public equally and alike. In principle this requirement is quite analogous to the commodities clause of the Interstate Commerce Act, which has been held constitutional and not open to the objection that it deprives persons of property without due process of law.

United States *v.* Delaware & Hudson, 213 U. S. 366.

Delaware, Lackawanna & Western R.R. Co. *v.* United States, 231 U. S. 363, 370.

In the latter case it is said (page 370):

The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The Commodities Clause was not an unreasonable and arbitrary pro-

hibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper.

Both of the plaintiffs in error are corporations foreign to the State of Massachusetts. (Rec., p. 9.) They have acquired their rights from the Stock Exchange under contracts made subsequent to the enactment of the Massachusetts Public Service Commission act in 1913, the contracts being made in 1914. (Rec., pp. 40, 50.)

It is open to a State to determine under what conditions corporations shall do business within its borders, whether domestic or foreign, and corporations cannot complain that they are deprived of property without due process of law because of the imposition of such conditions.

Missouri Ry. Co. *v.* Mackey, 127 U. S. 205.
Orient Insurance Co. *v.* Daggs, 172 U. S. 557, 566.

In the former case it is said:

It cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters.

In the latter case it is said:

That which a State may do with corporations of its own creation it may do with foreign corporations admitted into the

State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in Hooper *v.* California, 155 U. S. 648, and need not be repeated.

Paul *v.* Virginia, 8 Wall. 168, 181.
Bank of Augusta *v.* Earle, 13 Pet. 519, 589, 591.
Anglo-American Prov. Co. *v.* Davis Prov. Co., 191 U. S. 373.
Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 203.
Interstate Amusement Co. *v.* Albert, 239 U. S. 560.

Decisions cited by the plaintiffs in error relate only to cases of property not devoted to the public use, or to regulations not made under the exercise of the police power, and have no application to orders made under statutes passed in the exercise of that power.

In Missouri Pacific Ry. Co. *v.* Nebraska, 217 U. S. 196, relied on by them, the right of a State to interfere with substantial property rights, under a reasonable exercise of the police power, was distinctly affirmed.

The cases of Louisville, etc., R. R. Co. *v.* West Coast Co., 198 U. S. 483, and Weems Steamboat Co. *v.* People's Co., 214 U. S. 345, are distinguished from cases like the present by the decision in Southern Pacific Terminal Co. *v.* I. C. C., 219 U. S. 498, 519, 520, where it is said (page 520):

> There is great difference between competing carriers claiming the right to use the facilities of one another and the patrons of the same carrier contending for equality of treatment."

The business of the plaintiffs in error is of a public character, and reasonable regulation thereof does not conflict with the Fourteenth Amendment.

Pierce *v.* Drew, 136 Mass. 75, 77.
Boston *v.* Richardson, 13 Allen, 146, 160.
New England Tel. & Tel. Co. *v.* Boston Terminal Co., 182 Mass. 397, 399.
Rinehart *v.* Redfield, 87 N. Y. S. 789; s. c., 179 N. Y. 569.
New York & Chicago Grain & Stock Exchange *v.* Board of Trade, 127 Ill. 153, 163.
Smith *v.* Gold & Stock Telegraph Co., 42 Hun. 454.
Friedman *v.* Gold & Stock Telegraph Co., 32 Hun. 4.
Shepard *v.* Gold & Stock Telegraph Co., 38 Hun. 338.
See also cases cited *supra*, pp. 30–32.

In German Alliance Insurance Co. *v.* Kansas, 233 U. S. 389, at 406, it is said:

> The transportation of property — business of common carriers — is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest.

In Brass *v.* Stoeser, 153 U. S. 391, a law of the State of North Dakota was sustained which made all build-

ings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate.

There can be no question but that in the present case the telegraph companies are engaged in the public business of "transmission of intelligence" by electricity, and it surely is a reasonable requirement that if they furnish, incidental to the transmission, the intelligence which is transmitted, the entire business shall be conducted under the common-law principle applicable to business of a public character, without discrimination between members of the public.

Even if the order in the present case should be interpreted as requiring the telegraph companies to furnish the information and service, that requirement is well within the police power of the State. Statutes requiring corporations engaged in business of a public character to employ their property where reasonably required for the public convenience, without discrimination, have been repeatedly upheld.

Wisconsin, etc., R.R. Co. *v.* Jacobson, 179 U. S. 287.

Oregon R.R. & N. Co. *v.* Fairchild, 224 U. S. 510.

Louisville, etc,, R.R. Co. *v.* United States, 238 U. S. 1, 20.

Penna. R.R. Co. *v.* United States, 236 U. S. 351, 366.

Michigan Central R.R. Co. *v.* Michigan Railroad Commission, 236 U. S. 615, 631.

Chicago, Milwaukee & St. P. Ry. Co. *v.* Iowa, 233 U. S. 334.

New York & Queens Gas Co. *v.* McCall, 245 U. S. 345.

In the Jacobson case a State requirement that railroad companies make traffic connections was upheld. In the Pennsylvania case a similar requirement of the Interstate Commerce Commission was sustained. In the case of Chicago, Milwaukee & St. P. *v.* Iowa the railroad was required to accept loaded cars of other railroads; while in the Michigan case the railroad was required to deliver its own cars to another carrier to be taken to a point of loading, there loaded, and hauled back to the connecting road, and in the last case extension of gas mains at a cost of at least $61,000 was ordered.

No question of adequacy of return on the investment is open since the telegraph companies are free to make the same charges as they make to others for the same service.

Whatever may be thought of the constitutionality of a statute requiring a corporation to use its property in a certain way when it has not already embarked upon the particular enterprise in question, it has uniformly been held that where a public service corporation employs its property in serving portions of the public it is not a deprivation of property without due process of law to require the rendition of similar service to other persons similarly situated. That is all that has been required in the present case.

There is no question here but what the corporations may require payment of the same compensation for the service sought as is required of others, the same security for payment of bills or indemnity against injury to their instruments. The only requirement is that they remove discrimination.

Accordingly, it is submitted that the State statutes

here involved and the orders made under them are within the police power of the State, and have not deprived the telegraph companies of any property without due process of law.

Respectfully submitted,

HENRY C. ATTWILL,
*Attorney-General.*

H. WARE BARNUM,
*Assistant Attorney-General.*

# APPENDIX.

## INTERSTATE COMMERCE COMMISSION ACT, § 6.

(Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and August 24, 1912.) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be con-

veniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance

thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom

application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the ——— Company at ——— Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(*a*) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall apply only where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum

shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

(*b*) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(*c*) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(*d*) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the pay-

ment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

## PUBLIC SERVICE COMMISSION ACT.

*Mass. St. 1913, c. 784, §§ 2, 20, 22, 23, 26, 27 and 28.*

SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

*a.* The transportation or carriage of persons or property, or both, between points within the commonwealth by railroads, street railways, hereinafter called railways, electric railroads, and steamships, including express service and car service carried on upon or rendered in connection with such railroads, railways, electric railroads or steamships.

*b.* The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or by whomsoever provided, whether the service be common carriage or merely in facilitation of common carriage.

*c.* The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto.

. . . . . .

SECTION 20. Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the commission may order. In the case of common carriers the forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the interstate commerce commission. No common carrier shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the commission shall order, to be

given prior to the time fixed in such notice to the commission, for the changes to take effect. The commission for good cause shown may allow changes without requiring the thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and filed, as the commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: *provided, however*, that when any such contract or contracts are or become terminable by notice, the commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph or telephone corporation as and when directed by such order.

. . . . . .

SECTION 22. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges or any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commis-

sion shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the commission such authorization is consistent with the public interests, and the commission may from time to time modify or revoke such authorization.

SECTION 23. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. The commission shall have power after such a hearing to order from time to time that a railroad company shall operate its lines, of standard gauge, or such parts thereof as the commission shall prescribe, by electric power instead of by steam power, and in its order shall prescribe the time within which the work of electrification shall be done. Before making such order, the commission shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of other changes which may be

brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the commission of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees.

. . . . . .

SECTION 26. Every order of the commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served under the laws of this commonwealth. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification shall be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person and corporation upon whom it is served shall, if so required in the order, notify the commission in like manner whether the terms of the order are accepted and will be obeyed. Every order of the commission shall take effect at a time therein specified and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission.

SECTION 27. The supreme judicial court shall have jurisdiction in equity to review, annul, modify or amend any rulings

or orders of the commission which are unlawful to the extent only of such unlawfulness. The procedure before the said court shall be that prescribed by its rules, which shall state upon what terms the enforcement of the order shall be stayed. The attorney for any party petitioning the supreme judicial court hereunder shall file with the clerk of the court a certificate that he is of opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. The burden of proof shall be upon the party adverse to the commission to show that its order is invalid. Any proceeding in any court of this commonwealth directly affecting an order of the commission or to which the commission is a party shall have preference over all other civil proceedings pending in such court, except election cases.

SECTION 28. The supreme judicial court shall have jurisdiction upon the application of the commission to enforce all valid orders of the commission and all the provisions of this act. Whenever the commission shall be of opinion that a common carrier subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of the law or of any order of the commission, it shall direct counsel to the commission to begin, subject to the supervision of the attorney-general, an action or proceeding in the supreme judicial court in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.